Supreme Court, U. S.
FILED
AUG 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. 79-343

SUN SHIPBUILDING & DRY DOCK COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH C. KIMMEL and WILLIE MOORE,
Appellees.

On Appeal From the Commonwealth Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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Appellees.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT.

Appellant Sun Shipbuilding & Dry Dock Company ("Sun Ship") appeals from the final judgment of the Commonwealth Court of Pennsylvania in five consolidated actions, dated March 16, 1979, holding that application of the Pennsylvania Workmen's Compensation Act to permit the exercise of jurisdiction and the award of benefits thereunder for claims falling within the coverage of the Longshoremen's and Harbor Workers' Compensation Act is not repugnant to the Supremacy Clause of the United States Constitution or the exclusive federal admiralty jurisdiction.

OPINIONS BELOW.

The opinion and order of the Commonwealth Court of Pennsylvania is reported at 398 A. 2d 1111 (1979). No official report has been published to date and a copy of the opinion and order is reprinted in the appendix hereto, pp. A1-A10.

The opinions of the workmen's compensation referees and the Pennsylvania Workmen's Compensation Appeal Board in each of the five cases which were consolidated before the Pennsylvania Commonwealth Court are not reported. These opinions are reprinted in the appendix hereto, pp. A18-A72.

JURISDICTION.

This proceeding involves claims for benefits made pursuant to the Pennsylvania Workmen's Compensation Act ("Pennsylvania Act"). Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*. Pa. Stat. Ann. tit. 77, § 1 *et seq.* (Purdon). In accordance with the provisions of the Pennsylvania Act, each case before this Court was initially heard by a referee whose decision was appealed to the Pennsylvania Workmen's Compensation Appeal Board. Petitions to review the Board's decisions were filed by Sun Ship with the Commonwealth Court of Pennsylvania. The judgment of the Commonwealth Court affirming the decisions of the Workmen's Compensation Appeal Board and awarding benefits to the individual appellees was entered on March 16, 1979. Sun Ship petitioned the Supreme Court of Pennsylvania for allowance of appeal in each of the five cases decided by the Commonwealth Court, but these petitions were denied by orders dated June 4, 1979. (Appendix, pp. A11-A15.)

A notice of appeal to this Court was duly filed with the Commonwealth Court of Pennsylvania on July 19, 1979. (Appendix, pp. A16-A17.) This appeal is being docketed in this Court within 90 days from the orders denying Sun Ship's petitions for allowance of appeal below. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2).

In this appeal, Sun Ship challenges the ruling below that the Pennsylvania Act is not repugnant to the Constitution and laws of the United States when applied to a claim for compensation benefits for an injury occurring on the navigable waters of the United States as defined in Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act ("Longshoremen's Act"), Act of March 4, 1927, ch. 509, 44 Stat. 1426, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251. 33 U. S. C. § 903(a). This Court's appellate jurisdiction is sustained by the decisions in *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960) (appeal from Michigan courts of judgment sustaining validity of local smoke abatement code as applied to ships in interstate commerce); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921) (writ of error to Kentucky courts to review judgment sustaining validity of state statute requiring registration to do business as applied to foreign corporation); and *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917) (writ of error to New York courts to review judgment sustaining validity of state workers' compensation law as applied to injury occurring over navigable waters of the United States).

QUESTION PRESENTED.

Whether the Pennsylvania Workmen's Compensation Act is repugnant to the Supremacy Clause or the Admiralty Clause of the United States Constitution when the Pennsylvania Act is applied to permit the exercise of jurisdiction and the award of benefits thereunder for a claim resulting

from an injury to a maritime employee which falls within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. United States Constitution, Art. III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. United States Constitution, Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 3, Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1426, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251. 33 U. S. C. § 903:

COVERAGE

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

> (1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or
>
> (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

4. Section 5(a), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1426, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251. 33 U. S. C. § 905(a):

EXCLUSIVENESS OF LIABILITY

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, de-

pendents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

5. Section 101, Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, Pub. L. 736, No. 338, *as amended.* Pa. Stat. Ann. Tit. 77, § 1 (Purdon):

SHORT TITLE; APPLICATION OF ACT

That this act shall be called and cited as The Pennsylvania Workmen's Compensation Act, and shall apply to all injuries occurring wthin this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extraterritorially as provided by section 305.2.

RAISING THE FEDERAL QUESTION.

Sun Ship's contention that the Pennsylvania Act is constitutionally invalid as applied to the five claims at issue was raised at the earliest possible opportunity in Sun Ship's answers to the claim petitions wherein it alleged that no jurisdiction exists under the Pennsylvania Act because each

of these claims is cognizable only under the Longshoremen's Act. In four of the five cases at issue the referee rejected Sun Ship's contention that federal jurisdiction is exclusive, and Sun Ship challenged these holdings as erroneous in its appeals to the Pennsylvania Workmen's Compensation Appeal Board. In the fifth case (*Curtis L. Fields*) the referee sustained Sun Ship's jurisdictional argument and an appeal to the Board was taken by the claimant.

While specifically noting Sun Ship's contention that the exercise of state jurisdiction is unconstitutional, the Board concluded that jurisdiction to award compensation benefits in these cases is concurrent under the PWCA and the Longshoremen's Act. In Sun Ship's petitions for review of the Board's decisions filed with the Commonwealth Court of Pennsylvania it once again challenged this conclusion stating: "The Referee lacks jurisdiction of the claim because the claim falls within the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act." The Commonwealth Court considered, but rejected, Sun Ship's constitutional attack on the validity of the exercise of jurisdiction over these cases by Pennsylvania. Sun Ship again raised the constitutional issue before the Supreme Court of Pennsylvania in its petitions for allowance of appeal, but that Court declined to exercise its discretionary appellate jurisdiction over these cases.

STATEMENT OF THE CASE.

Each of the five cases before this Court involves a claim brought pursuant to the Pennsylvania Act for an alleged disfigurement resulting from an injury sustained by one of the individual appellees (collectively referred to as "claimants") while employed by Sun Ship, a company engaged in shipbuilding and ship repair. In each case the injuries occurred after November 26, 1972, the effective date of the 1972 amendments to the Longshoremen's Act.

Pub. L. No. 92-576, 86 Stat. 1251. All of the injuries occurred at Sun Ship's yard which is located in Chester, Pennsylvania, and which borders upon the Delaware River, a navigable water of the United States. The injuries sustained by claimants Fields and April occurred while performing repair functions on ships located in dry dock at Sun Ship's yard.

In each of the five cases the referee to whom the claim was assigned initially heard testimony and concluded that the Longshoremen's Act was applicable to the claim. As a result of this conclusion, the referee in the *Fields* case held that the claim under the Pennsylvania Act must be dismissed because the 1972 amendments to the Longshoremen's Act preempted state compensation acts with respect to maritime employees. (Appendix, pp. A58-A60.) The referee who heard the other four cases, however, concluded that, despite the applicability of the Longshoremen's Act, benefits could be awarded under the Pennsylvania Act because federal and state jurisdiction are concurrent. (Appendix, pp. A54-A57, A61-A72.)

When these cases came before the Workmen's Compensation Appeal Board, on appeal by the claimant in *Fields* and on appeal by Sun Ship in the other cases, the issue of exclusive federal jurisdiction was raised and the cases were briefed by the parties and consolidated for purposes of argument on this issue. Each of the Board's opinions are identical with respect to the jurisdictional issue. (Appendix, pp. A18-A53.) The opinions note that the parties have never disputed the coverage of the Longshoremen's Act, and the Board concluded, as did the referees, that the federal statute unquestionably applies. Nevertheless, the Board held that jurisdiction under the Pennsylvania Act exists because federal jurisdiction in this area is not exclusive, despite the 1972 amendments to the Longshoremen's Act which greatly expanded that Act's

coverage by redefining navigable waters of the United States to include areas landward of the water's edge.

A panel of three judges of the Commonwealth Court of Pennsylvania, in which court petitions to review the Board's decisions were lodged, received briefs and heard argument on the five cases, which had previously been consolidated for disposition. While additional issues concerning the interpretation of the substantive provisions of the Pennsylvania Act were raised before that court, the principal focus was on Sun Ship's constitutional challenge to the applicability of the Pennsylvania Act. In its opinion of March 16, 1979 the court did not question the applicability of the Longshoremen's Act to these claims. To the contrary, it proceeded to address Sun Ship's argument that the exercise of jurisdiction under the Pennsylvania Act is unconstitutional in circumstances where the Longshoremen's Act does apply. (Appendix, pp. A1-A10.)

The Commonwealth Court rejected Sun Ship's argument, however. While recognizing that the Supremacy Clause of the United States Constitution precludes states from enforcing their statutes when Congress has preempted a particular field, the court concluded that the language and the legislative history of the 1972 amendments to the Longshoremen's Act did not indicate a congressional intent to preempt state workmen's compensation laws for maritime workers within the coverage of the Longshoremen's Act. The Supreme Court of Pennsylvania denied Sun Ship's petitions for allowance of appeal from this decision on June 4, 1979, rendering it a final judgment for purposes of appeal to this Court as of that date. (Appendix, pp. A11-A15.) Because the administrative bodies and the courts of Pennsylvania have erroneously concluded that the 1972 amendments to the Longshoremen's Act do not provide for exclusive federal jurisdiction over claims

otherwise falling under that Act and that application of the Pennsylvania Act in these cases is not repugnant to the Constitution of the United States, Sun Ship has taken this appeal to this Court.

THE QUESTION IS SUBSTANTIAL.

This appeal presents an important question not previously considered by this Court regarding the constitutional limitations on the authority not only of Pennsylvania but of every state to enforce workers' compensation statutes of general applicability to maritime injuries which are now within the coverage of the Longshoremen's Act as expanded by Congress in 1972. Moreover, because the injuries of two of these claimants occurred during the performance of ship repairs on vessels in dry dock, an area expressly covered under the Longshoremen's Act even before 1972, important issues are raised regarding the constitutionality of attempts by the states to encroach upon an area long recognized as being within the exclusive federal admiralty jurisdiction. Both of these questions are critical to the administration of the Longshoremen's Act as amended by Congress in 1972.

The interface between federal and state jurisdiction to provide benefits to injured maritime workers has occupied this Court's attention on numerous occasions since the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). There it was held that the application of New York's compensation statute to an injury occurring to a stevedore unloading a ship on the navigable waters of the United States would destroy the national uniformity with regard to maritime matters which the Admiralty Clause of the Constitution, Art. III, § 2, and the congressional grant of exclusive admiralty jurisdiction to federal courts were designed to establish.

Indeed, this decision and subsequent cases relying on it provided the impetus for passage of the original Longshoremen's Act in 1927 to fill the void in workers' compensation for workers injured over the navigable waters and in the area of exclusive federal jurisdiction. Consistent with this gap-filling purpose, the Act's coverage was originally limited to "injuries occurring upon the navigable waters of the United States (including any dry dock)" but only when "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Act of March 4, 1927, ch. 509, § 3, 44 Stat. 1426. Thus, in 1927 Congress defined the scope of the Act's coverage by using the term which was used by the courts to define the area of exclusive federal admiralty jurisdiction ("navigable waters of the United States"), *e.g., State Industrial Comm'n v. Nordenholt Corp.*, 259 U. S. 263, 271 (1922); *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59-60 (1914), but left it to the courts to determine the meaning of that phrase as well as those instances where state jurisdiction might be exercised.

Unfortunately, the courts were unable to draw the theoretically precise line at which federal and state jurisdiction met under the original Longshoremen's Act, due in large part to exceptions engrafted upon the *Jensen* rule prior to the initial enactment of the Longshoremen's Act. The purpose of these exceptions was to ameliorate the perceived harshness of the *Jensen* rule which deprived workers whose injuries occurred over the navigable waters of any compensation coverage. *E.g., Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922) (state compensation award constitutional when injury occurred over the navigable waters, but where activity was of purely local interest).

This Court has grappled with the difficulties resulting from Congress's adoption of the *Jensen* line in numerous

cases spanning 45 years, finally concluding that it would not disturb the exercise of state jurisdiction over an injury occurring over the navigable waters if the injury fit within a recognized exception to the *Jensen* rule, *Davis v. Washington Department of Labor and Industries*, 317 U. S. 249 (1942), but that the Longshoremen's Act would furnish a remedy for all injuries occurring on the navigable waters. *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114 (1962). The Court made plain, however, that federal coverage stopped at the water's edge and that any expansion of that coverage or of the admiralty jurisdiction over maritime injuries would have to come from Congress. *Nacirema Operating Co. v. Johnson*, 396 U. S. 212, 223-24 (1969); *see Victory Carriers, Inc. v. Law*, 404 U. S. 202, 211 (1971).

In 1972 Congress responded by completely overhauling the Longshoremen's Act to remedy many problems in the Act's administration and to provide a comprehensive federal system of adequate compensation for all maritime workers. Whether viewed in terms of a congressional extension of the federal admiralty jurisdiction or as an act of supreme federal legislative authority, both the language of the 1972 amendments and their legislative history manifest the congressional intent that federal jurisdiction be exclusive over injuries within the Act's coverage, thereby constitutionally precluding the states from applying state compensation statutes to such cases.

In the 1972 amendments, Congress eliminated the "if recovery . . . may not validly be provided by State law" language of Section 3(a), changing the Longshoremen's Act from a "gapfiller" to an affirmative exercise of federal jurisdiction. *See Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, 256-65 (1977). At the same time, Congress redefined "navigable waters of the United States"

to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U. S. C. § 903(a).[1] These two language changes alone are strong evidence that Congress intended exclusive federal jurisdiction for claims falling within the expanded coverage of the Act.

This Court's decision in *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 205 (1971), reflects that the phrase "navigable waters of the United States" has long been used to define the scope of maritime tort jurisdiction and, consequently, that of exclusive federal admiralty jurisdiction. That decision, coming less than one year before the 1972 amendments to the Longshoremen's Act, also recognizes the ultimate authority of Congress to determine the scope of the federal admiralty jurisdiction. *Id.* at 211, 214, 215-216.

Had Congress merely intended to expand federal coverage to shoreside injuries without preempting state jurisdiction, it could have framed the amendment to Section 3(a) to cover accidents occurring on the navigable waters plus accidents on the land in the defined area. Instead Congress chose to redefine the phrase "navigable waters."

1. At the same time Congress explicitly defined the term "employee" to include "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U. S. C. § 902(3). In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), this Court recognized that the expansion of "navigable waters" to include shoreward areas necessitated an affirmative description of the class of workers covered. This definition is expansive, but it also insures the nexus between the maritime jurisdiction and the injury by creating both a situs and a status test for coverage. Thus, the definition further indicates Congress's intention to exercise its legislative jurisdiction in admiralty to the exclusion of state law. *See, Sea-Land Service, Inc. v. Director*, 540 F. 2d 629, 638 (3d Cir. 1976).

Obviously, none of the newly covered land areas are navigable waters in fact. Thus, Congress was not using this term to describe the physical attributes of the area within the Longshoremen's Act's coverage. To the contrary, "navigable waters of the United States" is used as a term of art to express the congressional intent that these areas are now within the federal admiralty jurisdiction.

The exclusivity of federal jurisdiction is also supported by the language of Section 5(a) of the Act, 33 U. S. C. § 905(a) which provides in pertinent part:

> The liability of an employer prescribed in section 904 of this title *shall be exclusive and in place of all other liability* of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . . (emphasis supplied).

While this language was part of the Longshoremen's Act prior to the 1972 amendments, it did not bear on the question of the applicability of state law since, by the unamended Act's terms, no federal remedy was provided thereunder if state law could provide a remedy. When Congress extended federal jurisdiction into areas formerly under state jurisdiction it did not amend this language. No amendment was required, however, because this provision already comported with the intent to create a system of exclusive federal coverage. Thus, the scope of the exclusivity merely expanded along with the expansion of the geographical coverage of the amended Act.

As noted above, the *Jensen* decision reflected the conclusion that, with respect to compensation for maritime

workers injured on the navigable waters, state law must yield to the needs of a uniform federal maritime law. The 1972 amendments reflect Congress's conclusion that this need for uniformity continues, but that to achieve true uniformity for injuries to maritime employees, the geographical reach of the maritime law must extend beyond the water's edge to the adjoining land areas. This is plain from the legislative history to the 1972 amendments:

> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> * * *
>
> It is apparent that if the Federal benefit structure embodied in the Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, *if State laws are permitted to continue to apply to injuries occurring on land. . . .*
>
> *The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.* Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other

> employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.
>
> *The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.*

H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Ad. News 4698, 4707-08 (emphasis supplied).

As this quotation amply demonstrates, Congress was very concerned with the inadequacy of benefits and the disparity in treatment accorded maritime workers, not only between federal and state coverage, but also among the coverages of the various states resulting from the wholly fortuitous factor of where the accident occurred. Thus, Congress sought to achieve two important goals when it enacted the 1972 amendments: adequacy of benefits and uniformity of coverage. Fully attaining these goals is possible only if federal coverage is exclusive for claims falling thereunder. By holding that jurisdiction under the Pennsylvania Act and the Longshoremen's Act is concurrent for these claims, however, the Pennsylvania courts have precluded the achievement of these express goals. Because this holding conflicts with the manifest intent of Congress to preempt state workers' compensation statutes for injuries to maritime employees, it runs afoul of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and

numerous decisions of this Court applying the preemption doctrine.

The determination of whether a federal statute preempts state law in a particular area is essentially a search for the intent of Congress. This process was summarized in *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 157-58 (1978):

> The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U. S. 519, 525 (1977). Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in *Rice, supra,* at 230:
>
> > "[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n,* 250 U. S. 566, 569; *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz,* 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the

> character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission,* 236 U. S. 439; *Charleston & W. C. R. Co. v. Varnville Co.,* 237 U. S. 597; *New York Central R. Co. v. Winfield,* 244 U. S. 147; *Napier v. Atlantic Coast Line R. Co., supra.*"

Accord, *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U. S. 624, 633 (1973).

Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U. S. 52, 67 (1941); *Jones v. Rath Packing Co., supra,* at 526, 540-541. Accord, *De Canas v. Bica,* 424 U. S. 351, 363 (1976).

Both the language and the legislative history of the 1972 amendments to the Longshoremen's Act strongly evidence a preemptive intent. Maritime activities have always been imbued with a dominant federal interest. The Longshoremen's Act now provides a pervasive system of compensation for all maritime workers, complete with procedural safeguards and a specialized adjudicatory body (the Benefits Review Board) to insure that the Act is liberally and uniformly construed, consistent with Congress's intent to provide adequate benefits for all maritime workers.

It is readily apparent that continued application of state law to claims falling within the expanded jurisdiction

of the Longshoremen's Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U. S. 52, 67 (1941). A maritime worker claiming under a state compensation act would be subject to all the procedural and substantive limitations found therein, which may differ substantially from the Longshoremen's Act. Certain provisions of the state act may appear more beneficial, thereby prompting the institution of a state claim, but other, less apparent provisions may operate to limit coverage under the state act to the detriment of the claimant.[2] Congress passed the 1972 amendments specifically to eliminate the disparities which arose from application of various state laws (each responsive to the interests of nonmaritime workers and employers in the particular state) to maritime workers whose interests Congress believed could only be adequately protected by a uniformly applicable federal compensation system.

During that period when the Longshoremen's Act did not apply to any injury occurring to a maritime worker on land, the states had a strong interest in protecting such workers through their general compensation statutes, in the same manner all other workers in the state were protected. After 1972, however, the states' interest in seeing that benefits are provided these workers is fully satisfied by application of the Longshoremen's Act. Thus, against the strong federal interest in adequacy and uniformity embodied in the 1972 amendments, the only state interest

2. This possibility was cogently illustrated by Justice Keith of the Texas Court of Civil Appeals in his dissenting opinion in *Johnson v. Texas Employers Insurance Ass'n,* 558 S. W. 2d 47, 52-58 (1977), wherein he unsuccessfully attempted to determine a motive for a claimant's desire to recover under the Texas compensation statute, which limited benefits to $70 per week, rather than the Longshoremen's Act where the claimant's benefits would have been $318.38 per week.

which is arguably served by continued application of a state compensation statute is the interest in having the claim processed under the particular provisions of the state statute. Such parochial concerns must yield to the predominating federal interests, particularly in circumstances involving the admiralty and maritime jurisdiction where federal supremacy has long been the rule.[3]

In short, whether viewed as an extension of federal jurisdiction in admiralty or as an exercise of Congress's legislative authority to preempt existing state law, the 1972 amendments to the Longshoremen's Act operate to preclude Pennsylvania or any other state from exercising jurisdiction over a claim for compensation benefits by a maritime worker within the Act's coverage. There is no question that each of the five claims at issue are within the coverage of the Longshoremen's Act, and the tribunals below assumed such coverage existed in rendering their decisions. Nevertheless, in opinions which pay scant attention to the statutory language or legislative history of the 1972 amendments, these tribunals concluded that benefits could be awarded under the Pennsylvania Act, holding that neither the United States Constitution nor federal law precluded the exercise of state jurisdiction. It is the propriety of this decision which Sun Ship asks this Court to determine.

There are several reasons why plenary consideration of this appeal is necessary. These cases present a question of first impression not only in this Court, but also, to Sun Ship's knowledge, in any federal court. Since the interpretation of federal statutes is a matter of federal law, this is the first opportunity for an authoritative construction of

3. *See, by contrast, Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 144 (1963) ("[T]he maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendance.").

the jurisdictional provisions of the 1972 amendments to the Longshoremen's Act as they relate to state law and the intent of Congress in enacting those provisions.

Moreover, the question of the jurisdictional interface between the amended Longshoremen's Act and state compensation statutes is national in scope and ripe for decision by this Court. Indeed, the courts of at least three states other than Pennsylvania have expressly decided this issue. *Poche v. Avondale Shipyards, Inc.,* 339 So. 2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche,* 434 U. S. 803 (1977);[4] *Murray v. City of Augusta,* 394 A. 2d 1171 (Me. 1978); and *Johnson v. Texas Employers Insurance Ass'n,* 558 S. W. 2d 47 (Tex. Ct. Civ. App. 1977). While each of these jurisdictions ultimately rejected the employers' contention that federal jurisdiction was exclusive, the issue was hardly free from doubt as the vigorous dissent of Justice Keith in *Johnson,* concluding federal jurisdiction is exclusive, demonstrates.

Furthermore, in *White v. Norfolk & Western Ry. Co.,* 217 Va. 823, 232 S. E. 2d 807, *cert. denied,* 434 U. S. 860 (1977), the Supreme Court of Virginia relied upon Section 5 of the Longshoremen's Act, 33 U. S. C. § 905, to conclude that jurisdiction under the Act would be exclusive for the claim of a railroad employee otherwise covered by the Federal Employers' Liability Act ("FELA"), 45 U. S. C. §§ 51-60, though it held under the facts at issue that the employee did not meet the status test for Longshoremen's Act coverage. The FELA bears the same relationship to federal admiralty jurisdiction as state compensation acts. *See Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917) (holding no recovery permissible under

4. This Court's dismissal of the appeal in *Poche* resulted from the lack of a final judgment since the Louisiana Supreme Court had remanded the case for trial. Thus, the merits of the jurisdictional issue were not reached in that appeal.

either New York law or FELA for injury occurring over the navigable waters). The Virginia courts may well conclude, therefore, that jurisdiction under the Longshoremen's Act is exclusive for injuries covered thereby, precluding recovery under the Virginia compensation statute. It is important that this uncertainty be resolved by this Court, given its ultimate authority to interpret federal statutes and to decide federal constitutional issues.

An additional reason for plenary consideration is presented by the Pennsylvania Commonwealth Court's disposition of the claims of John April and Curtis L. Fields. As stated above, the injuries to both of these claimants occurred while they were engaged in repairs to ships located in dry docks at Sun Ship's yard. Dry docks have always been considered part of the navigable waters of the United States, and this construction was confirmed by Congress in 1927 when it defined navigable waters in Section 3(a) of the original Longshoremen's Act to include "any dry dock."

After the passage of the original Longshoremen's Act both state and federal appellate courts continued to recognize that the making of repairs to a ship while in the water or in dry dock is a maritime activity on the navigable waters of the United States which falls within the area of exclusive federal jurisdiction. *E.g., Flowers v. Travelers Insurance Co.*, 258 F. 2d 220 (5th Cir. 1958), *cert. denied*, 359 U. S. 920 (1959); *Atlas Iron and Metal Co. v. Hesser*, 177 So. 2d 199 (Fla. 1965); *Warner v. Travelers Insurance Co.*, 332 S. W. 2d 789 (Tex. Civ. App. 1960); *see Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (4th Cir. 1951) (repairs made to dry dock held to constitute maritime activity within exclusive federal jurisdiction). In each of these cases the courts rejected state workers' compensation jurisdiction, even when it required dismissal of the claim.

The decision of the Commonwealth Court in *April* and *Fields* directly conflicts with these cases by holding that the Pennsylvania Act can furnish a basis for recovery for injuries occurring in dry dock. In effect, the Pennsylvania court has concluded that, beyond not intending to preempt state compensation laws for injuries to maritime workers occurring on land in 1972, Congress was also sanctioning an expansion of state jurisdiction over areas previously under exclusive federal jurisdiction as a matter of constitutional law by virtue of *Jensen* and its progeny. This wholly unwarranted conclusion is at odds with the express intent of Congress to expand federal jurisdiction to provide an adequate and uniform compensation system for maritime workers as well as with the fundamental need for national uniformity in maritime matters as expressed in *Jensen*.

Indeed, courts outside Pennsylvania have concluded that, whatever the effect of the 1972 amendments on the relationship between state and federal jurisdiction for maritime injuries on the land, federal admiralty jurisdiction remains exclusive over those areas where it was exclusive prior to 1972. *Wixom v. Travelers Insurance Co.*, 357 So. 2d 1343 (La. Ct. App. 1978) (exclusive jurisdiction under Longshoremen's Act for injuries occurring during repair of ship in navigable waters); *see Fusco v. Perini North River Assoc.*, Nos. 79-4006, 79-4015, 79-4016 (2d Cir., June 29, 1979) (if status test for coverage under Longshoremen's Act is read narrowly to preclude recovery thereunder for injuries occurring on navigable waters where employment is not "maritime," some workers on navigable waters would be left without any compensation remedy, state or federal). Thus, the Commonwealth Court has seriously misinterpreted the effect of the 1972 amendments to the Longshoremen's Act, resulting in an

unconstitutional expansion of jurisdiction under the Pennsylvania Act into areas long recognized as within exclusive federal admiralty jurisdiction.

In conclusion, the Pennsylvania Commonwealth Court has misconstrued the intent of Congress in enacting the 1972 amendments to the Longshoremen's Act. As a result, it has held that application of the Pennsylvania Act to afford compensation benefits to maritime workers within the coverage of the Longshoremen's Act is not repugnant to the United States Constitution or to the exclusive federal admiralty jurisdiction. This action plainly falls within the appeal jurisdiction of this Court under 28 U. S. C. § 1257(2), and the disposition of this important question of the proper relationship between federal and state law necessitates plenary consideration.

CONCLUSION.

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 31 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND FRANK JANUZCIEWICZ,
Respondents.

No. 32 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND CURTIS L. FIELDS,
Respondents.

No. 33 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND JOSEPH C. KIMMEL,
Respondents.

No. 34 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND WILLIE MOORE,
Respondents.

No. 35 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND JOHN APRIL,
Respondents.

Before: HONORABLE ROY WILKINSON, JR., *Judge*
HONORABLE GLENN E. MENCER, *Judge*
HONORABLE DAVID W. CRAIG, *Judge*

ARGUED: February 8, 1979

OPINION

OPINION BY JUDGE WILKINSON, JR.

Filed March 16, 1979

Each of the five cases which have been consolidated for appeal here involve awards of benefits by the Workmen's Compensation Appeal Board (Board) pursuant to The Pennsylvania Workmen's Compensation Act (Act) [1] for facial disfigurement resulting from five separate work-related injuries sustained by claimants while in the employ of Sun Shipbuilding and Dry Dock Company (petitioner), a company engaged in ship building and ship repair. We affirm.

The relevant findings of the referees regarding claimants' facial disfigurement are as follows: (1) a "residual scar about one-inch long over the left forehead extending into the eyebrow" (31 C. D. 1978); (2) a "one inch permanent scar above the left eyebrow" (32 C. D. 1978); (3) a "circular scar on the right cheek" (33 C. D. 1978); (4) a "residuum of a scar along the lower border of the right eye above the cheekbone approximately three-quarters of an inch long and visible from about fifteen feet" (34 C. D. 1978); and (5) "a residual oblique scar along the right side of the nose" (35 C. D. 1978). In each of the cases, the referee concluded that the claimant had suffered a serious and permanent facial disfigurement

1. Act of June 2, 1915, P. L. 736, *as amended,* 77 P. S. § 1 et seq.

within the purview of Section 306(c)(22) of the Act, 77 P. S. § 513(22). However, in 32 C. D. 1978 the referee found that claimant's remedy as a matter of law fell within the exclusive jurisdiction of federal compensation authorities pursuant to the Longshoremen's and Harbor Worker's Act [2] (hereinafter the Longshoremen's Act) and dismissed the claim petition.

Appeals were taken and consolidated for review by the Board. The decisions of the referee were upheld in all cases with respect to the factual findings of facial disfigurement and the determinations of compensability under the Act. Further, in 32 C. D. 1978 the Board held that the Longshoremen's Act did not confer exclusive jurisdiction in federal authorities.

Throughout the proceedings below, as here, the petitioner has maintained that Congress, by its 1972 amendments to the Longshoremen's Act, pre-empted the field of workmen's compensation for employees in maritime industries thereby ending the concurrent jurisdiction previously exercised by the state and federal governments. *See Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 82 S. Ct. 1196, 8 L. Ed 2d 368 (1962).

The original Longshoremen's Act was enacted by Congress in 1927. It contained two conditions of compensability, first that the injury occur on a navigable water and second that "[the] recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." [3] Thus, the 1927 Longshoremen's Act was intended only to be a gap-filler, that is, to fill the void created by the inability of states to remedy injuries occurring on navigable waters. *See*

2. 33 U. S. C. § 901 et seq.

3. Longshoremen's Act, ch. 509, § 3, 44 Stat. 1426 (1927) (current version at 33 U. S. C. § 903).

generally, Northeast Marine Terminal Co. v. Caputo, 432 U. S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977).

The 1972 amendments to the Longshoremen's Act significantly broadened the activities of maritime workers which would be compensated under the federal scheme to include those on the landside of the water's edge and also eliminated the reference to state law in Section 903.[4] Petitioner argues that the extension of federal coverage to injuries sustained in landside activities and the elimination of the condition that recovery could be had only if "not validly provided by state law" evidence an intent by Congress to pre-empt the field of compensation for maritime workers.

It is clear that where Congress enacts a comprehensive statute which is intended to occupy the field, the Supremacy Clause of the United States Constitution requires that the states defer to the superior command of Congress. *Mamula v. United Steelworkers of America*, 409 Pa. 175, 185 A. 2d 595 (1962). Where Congress has legislated in a field that the states have traditionally occupied, the resolution of a pre-emption question begins "with the assumption that the . . . powers of the States were not meant to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Co.*, 331 U. S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). Here, it is clear that except for the deletion of the language referring to state law, the 1972 amendments to the Longshoremen's Act do not expressly

4. The Longshoremen's Act currently provides:

"(a) Compensation shall be payable under this chapter in respect of disability or death . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U. S. C. § 903(a).

preclude the exercise of state jurisdiction. Moreover, the legislative history of the amendments, contrary to petitioner's assertion, fails to point clearly to pre-emption. Rather, the purpose of the Act was declared to be two-fold: (1) to provide a "substantial increase in benefits to maritime workers so that benefits would more accurately track the workers' average wage" and (2) to extend the federal coverage "beyond the water's edge." *See Caputo, supra.*

Absent a clear expression by Congress, petitioner contends that an analysis of the statute shows an implied intent to preempt. The factors to be considered in determining whether pre-emption will be implied include: (1) the aim and intent of Congress; (2) the pervasiveness of the federal regulatory scheme; (3) whether the nature of the subject matter demands exclusive federal regulation to achieve national uniformity; and (4) whether state law poses an obstacle to the execution of the objective of the federal statute. *Santa Fe Elevator Corp., supra.* Petitioner's arguments with regard to these factors may be succinctly capsulized as follows: that by broadening coverage to include maritime workers' activities on land Congress created a pervasive federal regulatory scheme and that exclusive federal jurisdiction is necessary to achieve national uniformity in compensating maritime workers. However, it is clear that the extension of coverage of the Longshoremen's Act limited to land-based activities will not comprehensively cover all maritime activities covered on land; rather, courts must still determine the demarcation line of those areas "customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U. S. C. § 903(a). Thus, the federal scheme is not so pervasive as to cover the entire field of a maritime worker's activity. Similarly, the nature of the subject matter (compensation of injured workers arguably covered within the area of federal jurisdiction) does not demand national uniformity so as to require exclusive federal jurisdiction. Rather because state and federal jurisdiction must meet at some line near the water's edge the federal interest in providing some compensation to injured workmen would be more nearly served by continuing the concept of concurrent jurisdiction. *Accord,* G. Gilmore & C. Black, *The Law of Admiralty,* 425-26 (2d ed. 1975); 4 A. Larson, *Workmen's Compensation Law,* § 89.70 (1978); *see also Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs,* 583 F. 2d 1273 (4th Cir. 1978) (where it was held that, under the 1972 amendments, the filing of a state claim did not preclude an award of benefits under the Longshoremen's Act).

Assuming, as we so hold, that the 1972 amendments to the Longshoremen's Act do not preclude the exercise of concurrent jurisdiction by the states, petitioner argues that there is insufficient competent evidence of permanent disfigurement in each of these cases because claimants failed to adduce medical evidence to establish the permanence of the scars. The record in each of these cases indicates that both the referees and the Board [5] observed the claimants' alleged disfigurements. However, the record fails to indicate that petitioner at any time during the hearings before the referees or the Board raised the issue of the permanence of the scars. We hold that scars of the type and nature presented here are *inter se* indicia of such permanence, that this issue of fact could be determined by the referee or Board on view, and that, unless the permanence of such a scar is put in issue, medical evidence need not be adduced to establish the permanence of the

5. As required by the rules of the Board. *See* 34 Pa. Code § 111.14.

disfigurement. Accordingly, petitioner's reliance on our decision in *Workmen's Compensation Appeal Board v. Pizzo,* 21 Cmwlth. 370, 346 A. 2d 588 (1976) where the permanence of the disfigurement was placed in issue at the referee's hearing, is misplaced.

Finally, we find no merit to petitioner's argument that the scars here were not as a matter of law as "serious" or of such a character to produce an unsightly appearance as required by Section 306(c)(22), 77 P. S. § 513(22). Such questions are issues of fact for the referee and the Board to determine upon a view of the claimants. *See Workmen's Compensation Appeal Board v. Jones & Laughlin Steel Corp.,* 25 Pa. Cmwlth. 542, 360 A. 2d 854 (1976).

Accordingly, we will enter the following

ORDER

AND NOW, March 16, 1979 , the orders of the Workmen's Compensation Appeal Board, dated December 8, 1977, at Nos. A-73219, A-73210, A-73220, A-73218 and A-73217, are hereby affirmed.

Further, it is ordered that judgment be entered in favor of the claimant, Frank Januzciewicz, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $106.00 per week beginning January 30, 1974 and continuing thereafter for a period of five weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorneys fees in the amount of $160.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, Curtis L. Fields, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-

insured, in the amount of $100.00 per week beginning May 2, 1973 and continuing thereafter for a period of 15 weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation with attorneys fees equal to 20 per cent of the total charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, Joseph C. Kimmel, and against the petitioner Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $114.00 per week beginning June 2, 1975 and continuing thereafter up to but not including July 1, 1975 and in the amount of $171.00 per week beginning July 1, 1975 and continuing thereafter up to but not including July 27, 1975, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorney's fees in the amount of $235.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, Willie Moore, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $100.00 per week beginning May 13, 1973 and continuing thereafter for a period of eight weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorney's fees in the amount of $160.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, John April, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $114.00 per week beginning

January 8, 1975 and continuing thereafter for a period of five weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorney's fees in the amount of $125.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

/s/ Roy Wilkinson, Jr.
Roy Wilkinson, Jr., *Judge*

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4264

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and JOHN APRIL,

Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 35 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73217

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4263

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and CURTIS L. FIELDS,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 32 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73210

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4259

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and FRANK JANUZCIEWICZ,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 31 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73219

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4265

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and JOSEPH C. KIMMEL,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 33 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73220

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4266

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and WILLIE MOORE,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 34 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73218

June 4, 1979. Petition Denied Per Curiam.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD
and
FRANK JANUZCIEWICZ,
Respondent in No. 31 C. D. 1978
CURTIS L. FIELDS,
Respondent in No. 32 C. D. 1978
JOSEPH C. KIMMEL,
Respondent in No. 33 C. D. 1978
WILLIE E. MOORE,
Respondent in No. 34 C. D. 1978
JOHN APRIL,
Respondent in No. 35 C. D. 1978

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sun Shipbuilding and Dry Dock Company, the petitioner in the above-captioned consolidated actions, hereby appeals to the Supreme Court of the United States from the final judgment of the Commonwealth Court of Pennsylvania, affirming the orders of the Pennsylvania Workmen's Compensation Appeal Board, entered herein on March 16, 1979. The Pennsylvania Supreme Court denied Sun Shipbuilding and Dry Dock

Company's petitions for allowance of appeal from the Commonwealth Court's judgment on June 4, 1979.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

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Filed: July 19, 1979

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73217

JOHN APRIL, Claimant
309 Donely Avenue
Aston, Pennsylvania 19014

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 195-05-9634

AFFIRMED

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OPINION

HERSKOVITZ, *Chairman*:

The Claimant in this proceeding is John April who claims compensation on account of disfigurement sustained January 8, 1975 while he was employed by Sun Shipbuilding and Dry Dock Company.

The employer (Sun) admitted the injury but denied the disfigurement.

The Referee found as a fact (No. 2) that the Claimant sustained a "laceration of the nose which having healed, left a residual, oblique scar along the side of the nose which (Conclusion of Law No. 2) was "of such extent and character as to produce an unsightly appearance".

The Referee awarded five weeks compensation. Considering that a maximum of 275 weeks is provided by the Act, we find the Referee's award to be reasonable.

Our own view of the scar reveals it to be serious and unsightly and we so find. We note that it is not usually incident to Claimant's employment.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA) 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Company v. Jensen*, 244 U. S. 205). Congress enacted the LHWCA in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

> Compensation shall be payable under this chapter . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.

The aforesaid language was interpreted by a series of judicial constructions to create (contrary to its supposed meaning) an area of concurrent state and federal jurisdiction demonstrated most notably in the case of *Calbeck v. Travelers Insurance Company,* 370 U. S. 114.

Despite concurrent federal and state jurisdiction, LHWCA was held not to cover maritime employees involved in shoreside injuries. *Nacirema Operating Company v. Johnson,* 396 U. S. 212.

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Federal coverage was in fact extended beyond the water's edge by the 1972 amendments to LHWCA which extended compensation for disability and death occurring not only upon navigable waters of the United States, but to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." (33 U. S. C. 903(a)).

In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended

or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to preempt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

Sun argues that this deletion is a strong signal that Congress intended preemption. We disagree with this argument. The Supreme Court's creation of the concurrent jurisdiction theory had effectively negated the words "may not validly be provided by State law".

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The rationale for finding lack of preemption, as stated in *Umbehagen* is worth adopting, viz. (250):

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> "On grounds of policy it seems undesirable in the highest degree to construe the amendments as having reintroduced the idea that the federal and state compensation systems are mutually exclusive. That had of course been the construction given to the 1927 Act under the 'may not validly be provided by state law' limitation. That construction led to the horrors of the 'maritime but local' period, from which the Supreme Court rescued us by the invention of the twi-

light zone in the 1942 Davis case. The twilight zone has its own difficulties, conceptual and otherwise, but, in practice it seems to have worked reasonably well. Indeed, a *theory of concurrent jurisdiction* (whether it is called a twilight zone or something else) seems to be the *only sensible way of dealing with state and federal statutes which meet at some vaguely defined line.* If LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law.

* * *

If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extention of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an invisible line,* that purpose will be served by locating the post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either*

the state or the federal act. We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counterpart to operate on both sides of the line." (Emphasis supplied, footnotes omitted) Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.,* 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of preemption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, the Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the *Jensen* line, see, e.g., *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema*

Operating Co. v. Johnson, 396 U. S. 212 (1969). (Footnotes omitted)

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Finding of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73210

CURTIS L. FIELDS, Claimant
356 North Redfield Street
Philadelphia, Pennsylvania

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania

Appeal by Claimant from Order of Referee Klevit
District No. 1, S.S. 190-34-3285

REVERSED

Claimant's Counsel:

Joseph Lurie, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew J. Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman*:

Claimant Curtis L. Fields has appealed the decision of Referee Jerold G. Klevit which found that he suffered a permanent scaring about his left eyebrow on May 2, 1973 which is serious and of such character as to produce an unsightly appearance. The disfigurement was evaluated at 15 weeks.

Since Claimant was admittedly a maritime worker entitled to benefits under the federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901, the Referee found as a matter of law that the Pennsylvania Workmen's Compensation Act was not applicable since Congress had pre-empted the field.

Although no appeal was taken by the employer (Sun), it has contested the Findings concerning the extent of disfigurement in its brief.

We find the Referee's evaluation of 15 weeks compensation to be reasonable.

Our own view of the injury reveals a scar about the left eyebrow which is serious, permanent and produces an unsightly appearance. The scar is not usually incident to Claimant's employment.

A much more complex issue raised by Sun's is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Co. v. Jensen*, 244 U. S. 205), Congress enacted the LHWCA in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

> Compensation shall be payable under this chapter . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.

The aforesaid language was interpreted by a series of judicial constructions to create (contrary to its supposed meaning) an area of concurrent state and federal jurisdiction demonstrated most notably in the case of *Calbeck v. Travelers Insurance Company*, 370 U. S. 114.

Despite concurrent federal and state jurisdiction, LHWCA was held not to cover maritime employees involved in shoreside injuries. *Nacirema Operating Company v. Johnson*, 396 U. S. 212.

After *Nacirema*, it was well established that in certain cases workers could recover under state remedies in particular situations seaward of the piers and docks (*Parker v. Motor Boat Sales*, 314 U. S. 244) and that recovery could be had under LHWCA for injuries occurring on navigable waters which might also have been compensable under state law (*Calbeck*, supra), but that only Congress could extend compensation coverage under LHWCA landward.

Federal coverage was in fact extended beyond the water's edge by the 1972 amendments to LHWCA which extended compensation for disability and death occurring not only upon navigable waters of the United States, but to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily

used by an employer in loading, unloading, repairing, or building a vessel." (33 U. S. C. 903(a)).

In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to pre-empt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

Sun argues that this deletion is a strong signal that Congress intended pre-emption. We disagree with this argument. The Supreme Court's creation of the concurrent jurisdiction theory had effectively negated the words "may not validly be provided by State law".

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The pre-emption issue has been decided in one reported case, *Umbehagen v. Equitable Equipment Company,* 329 S. 2d 245 (LA. Cir. Ct. App.).

The rationale for finding lack of pre-emption, as stated in *Umbehagen* is worth adopting, viz. (250):

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> "On grounds of policy it seems undesirable in the highest degree to construe the amendments as having reintroduced the idea that the federal and state compensation systems are mutually exclusive. That had

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> "If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extension of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an*

> *invisible line,* that purpose will be served by locating the post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either the state or the federal act.* We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counter-part to operate on both sides of the line."
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> (Emphasis supplied, footnotes omitted) Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.*, 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of pre-emption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, the Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the *Jensen* line, see, e.g., *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema Operating Co. v. Johnson,* 396 U. S. 212 (1969). (Footnotes omitted).

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Claimant's appeal is sustained.

The Referee's Findings of Fact are affirmed.

The Referee's Conclusions of Law and Order are vacated and in substitution thereof are entered the following:

CONCLUSIONS OF LAW

FIRST: Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

SECOND: Claimant, having sustained serious and permanent facial disfigurement as above described, of

such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

THIRD: Disfigurement is valued as equivalent to 15 weeks of compensation under the Pennsylvania Workmen's Compensation Act.

AWARD

Sun Shipbuilding and Dry Dock Company is ordered and directed to pay Curtis L. Fields compensation for permanent and unsightly facial disfigurement at the rate of $100.00 per week beginning May 2, 1973 and continuing thereafter for a period of 15 weeks together with interest at the rate of 10 percent per annum on deferred installments.

APPROVAL OF ATTORNEY'S FEE

There shall be paid directly to Joseph Lurie, Esquire, out of the compensation awarded, counsel fees equal to 20 percent of the total paid as compensation.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73219

FRANK JANUZCIEWICZ, Claimant
1112 Brown Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 195-12-9304

AFFIRMED

Claimant's Counsel:

Marc Jacobs, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew J. Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman*:

In this case, Referee Fred J. Troilo found that Frank Januzciewicz sustained a job-related injury on January 30,

1974 which resulted in serious disfigurement consisting of a scar about one inch long over the left forehead and extending into the eyebrow (Finding of Fact No. 2).

The scar produced an unsightly appearance such as is not usually incident to Claimant's employment (Conclusion of Law No. 2).

Compensation of five weeks duration was awarded.

We find the Referee's award of five weeks compensation to be reasonable. Our own observation of the injury reveals a serious, permanent scar of the left area of the forehead producing an unsightly appearance such as is not usually incident to Claimant's employment.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Company v. Jensen*, 244 U. S. 205), Congress enacted the LHWCA in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

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In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to preempt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

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Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Findings of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73220

JOSEPH C. KIMMEL, Claimant
230 Pennell Road
Aston, Pennsylvania 19014

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 195-36-0437

AFFIRMED

Claimant's Counsel:

Roland Artigues, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman*:

This appeal involves Referee Fred J. Troilo's award of compensation for disfigurement consisting of a circular scar on the right cheek, serious and permanent (Finding of Fact No. 2) producing an unsightly appearance not usually incident to Claimant's employment (Conclusion of Law No. 2).

The employer (Sun) admitted the injury but denied the extent of the disfigurement.

There is no dispute that the injury ocurred on June 2, 1975 in a shop building of Sun located across from a dry dock on the Delaware River.

Eight weeks compensation was awarded.

We find this award to be reasonable under the Pennsylvania Workmen's Compensation Act.

Our view of the Claimant revealed a serious permanent scar of the right cheek producing an unsightly appearance.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA) 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

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There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

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zone has its own difficulties, conceptual and otherwise, but, in practice, it seems to have worked reasonably well. Indeed, a *theory of concurrent jurisdiction* (whether it is called a twilight zone or something else) seems to be the *only sensible way of dealing with state and federal statutes which meet at some vaguely defined line.* If LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law.

* * *

"If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extension of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an invisible line,* that purpose will be served by locating the post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either the state or the federal act.* We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counterpart to operate on both sides of the line." (Emphasis supplied, footnotes omitted) Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.,* 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of preemption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, The Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the *Jensen* line, see, e.g., *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema Operating Co. v. Johnson,* 396 U. S. 212 (1969). (Footnotes omitted)

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Findings of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73218

WILLIE MOORE, Claimant
1707 West Seventh Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 171-26-2668

AFFIRMED

Claimant's Counsel:

Roland Artigues, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman:*

The Claim Petition of Willie Moore alleged that on May 13, 1973 while working on a way (pier) of the Defendant (Sun) located in the Delaware River, he sustained an injury resulting in serious and permanent facial disfigurement.

Referee Fred J. Troilo found the injury to have resulted in a residuum of a scar along the lower border of the right eye above the cheek bone approximately three-quarters of an inch long (Finding of Fact No. 2). The disfigurement was found serious, permanent and of such character to produce an unsightly appearance. Eight weeks compensation was awarded.

Sun does not dispute the time or place of the injury but denies the degree of disfigurement.

We find the award of eight weeks compensation reasonable. Our own view of the injury reveals a scar above the right eye three-quarters of an inch long which is serious, permanent and produces an unsightly appearance not usually incident to Claimant's employment.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Company v. Jensen,* 244 U. S. 205), Congress enacted the LHWCA, in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

> Compensation shall be payable under this chapter . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.

The aforesaid language was interpreted by a series of judicial constructions to create (contrary to its supposed meaning) an area of concurrent state and federal jurisdiction demonstrated most notably in the case of *Calbeck v. Travelers Insurance Company,* 370 U. S. 114.

Despite concurrent federal and state jurisdiction, LHWCA was held not to cover maritime employees involved in shoreside injuries. *Nacirema Operating Company v. Johnson,* 396 U. S. 212.

After *Nacirema,* it was well established that in certain cases workers could recover under state remedies in particular situations seaward of the piers and docks (*Parker v. Motor Boat Sales,* 314 U. S. 244) and that recovery could be had under LHWCA for injuries occurring on navigable waters which might also have been compensable under state law (*Calbeck,* supra), but that only Congress could extend compensation coverage under LHWCA landward.

Federal coverage was in fact extended beyond the water's edge by the 1972 amendments to LHWCA which extended compensation for disability and death occurring not only upon navigable waters of the United States, but to "any adjoining pier, warf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." (33 U. S. C. 903(a)).

In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to preempt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

Sun argues that this decision is a strong signal that Congress intended preemption. We disagree with this argument. The Supreme Court's creation of the concurrent jurisdiction theory had effectively negated the words "may not validly be provided by State law".

The 1972 amendment accepted this reality.

The preemption issue has been decided in one reported case, *Umbehagen v. Equitable Equipment Company,* 329 S. 2d 245 (LA. Cir. Ct. App.).

The rationale for finding lack of preemption, as stated in *Umbehagen* is worth adopting, viz. (250):

> Nor can we say that the Congresional action was so pervasive as to compel the conclusion that state law could no longer operate within the expanded territorial limits. Indeed, academic discussion of the expanded jurisdiction has suggested that concurrent jurisdiction is the only workable policy, the following being particularly pertinent:
>
> "On grounds of policy it seems undesirable in the highest degree to construe the amendments as having reintroduced the idea that the federal and state compensation systems are mutually exclusive. That had of course been the construction given to the 1927 Act under the 'may not validly be provided by state law' limitation. That construction led to the horrors of the 'maritime but local' period, from which the Supreme Court rescued us by the invention of the twilight zone in the 1942 Davis case. The twilight zone has its own difficulties, conceptual and otherwise, but, in practice it seems to have worked reasonably well. Indeed, a *theory of concurrent jurisdiction* (whether it is called a twilight zone or something else) seems to be the *only sensible way of dealing with state and federal statutes which meet at some vaguely defined line.* If LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law.
>
> * * *
>
> "If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extension of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an invisible line,* that purpose will be served by locating the

> post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either the state or the federal act.* We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counterpart to operate on both sides of the line." (Emphasis supplied, footnotes omitted). Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.*, 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of preemption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, The Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in

> particular situations seaward of the *Jensen* line, see, *e.g., Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema Operating Co. v. Johnson,* 396 U. S. 212 (1969). (Footnotes omitted.)

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Findings of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim 195-05-9634

JOHN APRIL, Claimant
309 Donely Avenue
Aston, Penna. 19014

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Penna.
Self-Insured

BEFORE:

Referee Fred J. Troilo
1521 State Office Building
Philadelphia, Penna. 19130

A hearing was scheduled in this matter at the Toal Building, 2nd and Orange Streets, Media, Penna. on February 25, 1976 (concluded).

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on December 5, 1975. Defendant filed a responsive Answer thereto.

FINDINGS OF FACT

The Referee makes the following Findings of Fact:

1. Claimant sustained a work-related injury on January 8, 1975 while in the employ of the Defendant which resulted in serious and permanent facial disfigurement.

2. The nature and cause of the injury were a laceration of the nose, which having healed, left a residual, oblique scar along the side of the nose, caused when Claimant was struck by flying metal as he operated a chipping hammer located on Defendant's dry dock.

3. There was no loss of time and Claimant incurred no medical expense as a result of the injury; however, the Defendant resists this action principally on the ground of lack of jurisdiction in the State of Pennsylvania to entertain the same in that the Longshoremen's and Harbor Worker's Compensation Act of 1972 has pre-empted exclusive jurisdiction in this area.

4. The Referee in resolving this issue, relies on the decision of the Court of Appeals of Louisiana for the fourth circuit in the case of Oscar Umbehagen v. Equitable Equipment Company #6946, decided March 16, 1976 and not yet reported but furnished the Referee through the Office of the Solicitor for the United States Department of Labor as the position adopted by the Director of the Office of Worker's Compensation Programs of the United States Department of Labor.

That decision holds that the Longshoremen's and Harbor Worker's Compensation Act does not pre-empt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy.

In the above cited case, the Louisiana Court had before it the single and precise issue as is here raised and

held that both the Longshoremen's and Harbor Worker's Compensation Act and the State Compensation Laws can be concurrently applicable to an employment injury in the same manner as two states compensation laws can be, especially in an area where there is no conflict between the two systems sufficient to compel a divestiture of state power.

5. Claimant earned wages sufficient to entitle him to compensation at the maximum compensation rate where applicable.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Even though the Federal Longshoremen's and Harbor Worker's Compensation Act is also applicable, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement, as above described, of such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, he is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement as equivalent to approximately five weeks of compensation under the provisions of the Pennsylvania Workmen's Compensation Act.

Award

Compensation is Awarded and the Defendant, Sun Shipbuilding & Dry Dock Company, hereby Ordered and

Directed to pay to the Claimant, John April, compensation for permanent and unsightly facial disfigurement at the rate of $114.00 per week beginning January 3, 1975 and continuing thereafter for a period of five weeks; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

Approval of Attorney Fee

The Referee approves an attorney fee to Claimant's counsel in the approximate equivalent of 20% of the gross award to the Claimant herein in the specific amount of $125.00, same to be charged against the Award to the Claimant and paid directly to Roland J. Artigues, Esquire, with the balance of the Award being paid to the Claimant personally.

/s/ Fred J. Troilo
Fred J. Troilo, Referee
First District

Phila., Pa.
April 25, 1977
pm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim Petition 190-34-3285

CURTIS L. FIELDS, Claimant
356 N. Redfield Street
Philadelphia, Penna.

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Penna.
(a self-insured employer)

BEFORE:

Referee Jerold G. Klevit
1509 State Office Building
Philadelphia, Penna. 19130

Hearings were scheduled in the above-captioned matter at the office of the Referee as follows: April 15, 1976 and June 17, 1976.

RECORD

Claimant filed a Claim Petition for disfigurement which he alleges resulted from an injury he sustained during the course of his employment with Defendant. Defendant filed an Answer which pleads that exclusive jurisdiction lies under the Federal Longshoremen's and Harbor Worker's Compensation Act.

FINDINGS OF FACT

1. On May 2, 1973, Claimant struck his head upon a rail which caused a one inch permanent scar about his left eyebrow. As a result, Claimant missed a short time from work which does not exceed the statutory waiting period. The injury took place in an area customarily employed by the Defendant for shipbuilding and ship repair.

2. At the time of the aforesaid injury Claimant was in the employ of Defendant, which is in the business of shipbuilding and ship repair, and Claimant's average weekly wage was $145.60.

3. The scar referred to in Finding of Fact No. 1 is serious and permanent and is of such a character as to produce an unsightly appearance, and said scar is such as is not usually incident to Claimant's employment. The Referee evaluates Claimant's disfigurement at 15 weeks.

CONCLUSIONS OF LAW

1. At the time Claimant sustained his injury of May 2, 1973, he was in the employ of an employer falling within the exclusive jurisdiction of the Federal Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. Sec. 901, et seq., as amended.

2. Claimant's injury is not covered by the Pennsylvania Workmen's Compensation Act since Congress has occupied the field with respect to injuries sustained by employees of maritime employers, which employees are covered by the Federal Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. Sec. 901 et seq., as amended.

3. Claimant's Petition for Compensation must be dismissed.

ORDER

AND NOW, this 22nd day of April 1977, it is ORDERED that the Claim Petition filed herein be and it is hereby DISMISSED.

/s/ JEROLD G. KLEVIT
Jerold G. Klevit, Referee
First District

Phila. Pa.

April 26, 1977

pm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim Petition 195-12-9304

FRANK JANUZCIEWICZ, Claimant
1112 Brown Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Pennsylvania 19013
(Self-insured)

BEFORE:

Referee Fred J. Troilo
Room 1521 State Office Building
Philadelphia, Pennsylvania 19130

Hearing was scheduled in the above-captioned matter at the Toal Building, Second & Orange Streets, Media, Pennsylvania as follow: May 12, 1976 (case concluded). (Reporter: Norman DiGrazio).

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on February 9, 1976. Defendant filed a responsive Answer thereto.

Findings of Fact

From the evidence offered, the Referee makes the following Findings of Fact:

1. Claimant sustained a work-relatd injury on or about January 30, 1974 while in the employ of the Defendant which resolved itself after treatment into a permanent and serious facial disfigurement.

2. The nature and cause of the injury were a bruised and lacerated forehead, which after treatment, shows a "residual scar about one-inch long over the left forehead" and extending into the eyebrow, caused when a metal washer struck Claimant in the face.

3. Claimant lost no time from his work. There are no medical expenses involved. The Defendant admits the injury but resists the Claimant's action on the sole ground that the state of Pennsylvania has no jurisdiction in this matter since the Federal Longshoremen's and Harbor Worker's Act of 1972 has pre-empted jurisdiction in this area to the exclusion of State law.

4. In resolving this issue the Referee relies on the decision of the Court of Appeals of Louisiana for the fourth circuit, to wit, in the case of Umbehagen v. Equitable Equipment Company #6946, decided on March 16, 1976 and not yet reported, but furnished the Referee through the Office of the Solicitor General of the United States Department of Labor as the position adopted by the Director of the Office of Worker's Compensation Programs of the Federal Department of Labor.

The decision holds that the Longshoremen's and Harbor Worker's Compensation Act of 1972 does not preempt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy. The above cited case was resolved on that sole

and single issue and the Court held that both the Longshoremen's and Harbor Worker's Compensation Act and the state compensation laws can be concurrently applicable to an employment injury in the same manner as two states compensation laws can; especially in an area where there is no conflict between the two systems sufficient to compel a total divestiture of power.

5. The Claimant earned wages that would entitled him to the maximum compensation payable where and when applicable.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement as above described of such character and extent as to produce an unsightly appearance, such as is not usually incident to the Claimant's employment is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement in this case as equivalent to appoximately five weeks of compensation under the provisions of the Pennsylvania Workmen's Act.

Award

Compensation is Awarded and the Defendant, Sun Shipbuilding and Drydock Company, hereby Ordered and

DIRECTED to pay to the Claimant, Frank Januzciewicz, compensation for permanent and unsightly facial disfigurement at the rate of $106.00 per week beginning January 30, 1974 and continuing thereafter for a period of five weeks; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

APPROVAL OF ATTORNEY FEE

The Referee approves an attorney fee approximating 20% of the total AWARD to the Claimant in the specific amount of $160.00 same to be paid directly to the Claimant's attorney, Marc Jacobs, Esquire, and charged against the foregoing AWARD to the Claimant, with the balance of said AWARD being paid to the Claimant personally.

/s/ FRED J. TROILO
Fred J. Troilo, Referee
First District

Philadelphia, Pennsylvania
April 25, 1977
mjm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim 195-36-0437

JOSEPH C. KIMMEL, Claimant
230 Pennell Road
Aston, Pennsylvania 19014

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Penna. 19013
Self-Insured

BEFORE:

Referee Fred J. Troilo
1521 State Office Building
Philadelphia, Penna. 19130

Hearings in the above-entitled case were scheduled at the Toal Building, 2nd and Orange Streets, Media, Penna. as follows: October 27, 1975 (continued); January 5, 1976, evidence entered and case concluded. (Reporter: Robert Cohen).

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on August 28, 1975. Defendant filed a responsive Answer thereto.

Findings of Fact

From the evidence offered, the Referee makes the following Findings of Fact:

1. Claimant sustained an injury on June 2, 1975 while in the employ of the Defendant, which resulted in permanent and serious facial disfigurement.

2. The nature and cause of the injury were a burn on the right cheek, caused when while Claimant was holding a piece of metal for welding, the welder lifted his shield and the hot rod used to make the weld struck Claimant on the right side of the face. After treatment, the burn resolved itself into a circular scar on the right cheek, which is both serious and permanent in its effect.

3. Claimant earned wages which would entitle him to the maximum compensation rate when and where applicable.

4. No compensation has been paid.

5. Claimant lost no time from his work and no medical expense has been incurred.

6. This claim is resisted by the Defendant on the single ground that the State of Pennsylvania has no jurisdiction to entertain the claim since the Federal Longshoremen's and Harbor Worker's Act of 1972 has pre-empted all authority in this area to the exclusion of state law.

7. The Referee, in resolving this issue, relies on the decision of the Court of Appeals of Louisiana for the Fourth Circuit pronounced in the case of Oscar Umbehagen v. Equitable Equipment Company #6946, decided March 16, 1976 and not yet reported, but furnished the Referee through the Office of the Solicitor for the United States Department of Labor as the position adopted by

the Director of the Office of Worker's Compensation Programs of the United States Department of Labor.

The above cited decision holds that the Longshoremen's and Harbor Worker's Compensation Act of 1972 does not pre-empt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy. It may be noted that the Umbehagen case was resolved on the precise issue as that in the present case and the Court held that both the Longshoremen's and Harbor Worker's Compensation Act and the State Compensation Laws can be concurrently applicable to an employment injury in the same manner as two states' compensation laws can; especially in the area where there is no conflict between the two systems sufficient to compel a total divestiture of state power.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement as above described, of such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, he is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement in this case as equivalent to approximately eight weeks of compensa-

tion under the provisions of the Pennsylvania Workmen's Compensation Act.

AWARD

Compensation is Awarded and the Defendant, Sun Shipbuilding & Dry Dock Company, hereby ORDERED and DIRECTED to pay to the Claimant, Joseph C. Kimmel, compensation for permanent and unsightly facial disfigurement at the rate of $114.00 per week beginning June 2, 1975 and continuing thereafter up to but not including July 1, 1975; compensation at the rate of $171.00 per week beginning July 1, 1975 and continuing thereafter up to but not including July 27, 1975; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

APPROVAL OF ATTORNEY FEE

The Referee approves an attorney fee approximating 20% of the total Award to the Claimant in the specific amount of $235.00, same to be paid directly to the Claimant's attorney, Roland J. Artigues, Esquire, and charged against the foregoing Award to the Claimant, with the balance of the said Award being paid to the Claimant personally.

/s/ FRED J. TROILO
Fred J. Troilo, Referee
First District

Phila., Pa.

April 25, 1977

pm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim Petition 171-26-2668

WILLIE MOORE, Claimant
1707 West 7th Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Pennsylvania 19013
Self-insured

BEFORE:

Referee Fred J. Troilo
1521 State Office Building
Philadelphia, Penna. 19130

Hearings in the above-entitled case were scheduled at the Toal Building, 2nd and Orange Streets, Media, Pennsylvania as follows: January 8, 1976, testimony taken and case concluded. (Reporter: Robert Cohen)

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on November 21, 1975. Defendant filed a responsive Answer thereto.

Findings of Fact

From the evidence offered, the Referee makes the following Findings of Fact:

1. Claimant sustained a work-related injury on May 3, 1973 from which he suffered serious and permanent facial disfigurement.

2. The nature and cause of the injury were bruised and lacerated areas above the right eye which after treatment and closure of the lacerations with seven stitches which left a residuum of a scar along the lower border of the right eye above the cheek bone approximately three-quarters of an inch long and visible for about fifteen feet caused when Claimant while attempting to dislodge a butt caught under the staging to a ships way struck the butt with a wooden maul. The maul flew back and hit the Claimant in and about the right eye.

3. Claimant earned wages of $164.30 per week based on an hourly rate of $4.12 for a forty hour week.

4. This claim is for disfigurement only and is resisted by the Defendant on the ground that this is a maritime case coming under the Longshoremen's and Harbor Worker's Compensation Act of 1972 which Defendant insists establishes the pre-eminence of the Federal Maritime Power in cases where states have otherwise valid legislative jurisdiction. In resolving this issue, the Referee relies on the decision of the Court of Appeals of Louisiana for the fourth circuit, to wit, in the case of Umbehagen v. Equitable Equipment Company, # 6946 decided on March 16, 1976 and not yet reported, but furnished to the Referee through the office of the solicitor of the U. S. Department of Labor as the position adopted by the Director of the Office of Workers Compensation Programs of the Department of Labor.

The decision holds that the Longshoremen's and Harbor Worker's Compensation Act does not preempt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy. The above cited case was resolved on that particular issue and the Court held that both the Longshoremen's and Harbor Worker's Compensation Act and the state compensation laws can be concurrently applicable to an employment injury in the same manner as two states compensation laws can; especially in an area where there is no conflict between the two systems sufficient to compel a total divestiture of state power.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement as above described, of such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement as equivalent to approximately eight weeks of compensation under the provisions of the Pennsylvania Workmen's Compensation Act.

Award

Compensation is Awarded and the Defendant, Sun Shipbuilding & Dry Dock Company, hereby Ordered and

DIRECTED to pay to the Claimant, Willie Moore, compensation for permanent and unsightly facial disfigurement at the rate of $100.00 per week beginning May 13, 1973 and continuing thereafter for a period of eight weeks; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

APPROVAL OF ATTORNEY FEE

The Referee approves an attorney fee approximating 20% of the total award to the Claimant in the specific amount of $160.00, the same to be paid directly to Claimant's attorney, Roland Artigues, Esquire, with the balance of said Award being paid to the Claimant personally.

/s/ FRED J. TROILO
Fred J. Troilo, Referee
First District

Phila., Pa.
April 20, 1977
pm

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-343.

SUN SHIP, INC.,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH C. KIMMEL and WILLIE MOORE,

Appellees.

On Appeal From the Commonwealth Court of Pennsylvania.

FILED AUGUST 31, 1979

PROBABLE JURISDICTION NOTED JANUARY 7, 1980

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

JOHN APRIL

Dec. 5, 1975—Claim Petition pursuant to Pennsylvania Workmen's Compensation Act filed (No. 195-05-9634).

Jan. 9, 1976—Answer filed by Defendant Sun Ship.

Feb. 25, 1976—Hearing before Referee Fred J. Troilo.

Apr. 25, 1977—Decision of Referee awarding benefits filed.

May 24, 1977—Appeal to Workmen's Compensation Appeal Board from Referee's decision filed by Sun Ship (No. A-73217).

July 20, 1977—Hearing before Workmen's Compensation Appeal Board.

Nov. 25, 1977—Opinion of Workmen's Compensation Appeal Board affirming award of Referee filed.

Jan. 9, 1978—Petition to review order of Workmen's Compensation Appeal Board filed by Sun Ship with Pennsylvania Commonwealth Court (No. 35 Commonwealth Docket 1978).

Feb. 8, 1979—Argument before three-member panel of Pennsylvania Commonwealth Court.

Mar. 16, 1979—Opinion and order of Pennsylvania Commonwealth Court affirming order of Workmen's Compensation Appeal Board filed.

Apr. 11, 1979—Petition for allowance of appeal from order of Pennsylvania Commonwealth Court filed by Sun Ship with Pennsylvania Supreme Court (Allocatur Docket No. 4264).

June 4, 1979—Petition for allowance of appeal denied by Pennsylvania Supreme Court.

July 19, 1979—Notice of appeal to United States Supreme Court filed by Sun Ship with Pennsylvania Commonwealth Court.

CURTIS L. FIELDS

Jan. 19, 1976—Claim Petition pursuant to Pennsylvania Workmen's Compensation Act filed (No. 190-34-3285).

Feb. 11, 1976—Answer filed by Defendant Sun Ship.

June 17, 1976—Hearing before Referee Jerold G. Klevit.

Apr. 26, 1977—Decision of Referee dismissing claim for lack of jurisdiction filed.

May 23, 1977—Appeal to Workmen's Compensation Appeal Board from Referee's decision filed by Claimant Fields (No. A-73210).

July 20, 1977—Notes of testimony of hearing before Referee filed.

July 20, 1977—Hearing before Workmen's Compensation Appeal Board.

Nov. 25, 1977—Opinion of Workmen's Compensation Appeal Board reversing decision of Referee and awarding benefits filed.

Jan. 9, 1978—Petition to review order of Workmen's Compensation Appeal Board filed by Sun Ship with Pennsylvania Commonwealth Court (No. 32 Commonwealth Docket 1978).

Feb. 8, 1979—Argument before three-member panel of Pennsylvania Commonwealth Court.

Mar. 16, 1979—Opinion and order of Pennsylvania Commonwealth Court affirming order of Workmen's Compensation Appeal Board filed.

Apr. 11, 1979—Petition for allowance of appeal from order of Pennsylvania Commonwealth Court filed by Sun Ship with Pennsylvania Supreme Court (Allocatur Docket No. 4263).

June 4, 1979—Petition for allowance of appeal denied by Pennsylvania Supreme Court.

July 19, 1979—Notice of appeal to United States Supreme Court filed by Sun Ship with Pennsylvania Commonwealth Court.

FRANK JANUZCIEWICZ

Feb. 9, 1976—Claim Petition pursuant to Pennsylvania Workmen's Compensation Act filed (No. 195-12-9304).

Mar. 15, 1976—Answer filed by Defendant Sun Ship.

May 12, 1976—Hearing before Referee Fred J. Troilo.

Apr. 25, 1977—Decision of Referee awarding benefits filed.

May 24, 1977—Appeal to Workmen's Compensation Appeal Board from Referee's decision filed by Sun Ship (No. A-73219).

July 20, 1977—Hearing before Workmen's Compensation Appeal Board.

Nov. 25, 1977—Opinion of Workmen's Compensation Appeal Board affirming award of Referee filed.

Jan. 9, 1978—Petition to review order of Workmen's Compensation Appeal Board filed by Sun Ship with Penn-

sylvania Commonwealth Court (No. 31 Commonwealth Docket 1978).

Feb. 8, 1979—Argument before three-member panel of Pennsylvania Commonwealth Court.

Mar. 16, 1979—Opinion and order of Pennsylvania Commonwealth Court affirming order of Workmen's Compensation Appeal Board filed.

Apr. 11, 1979—Petition for allowance of appeal from order of Pennsylvania Commonwealth Court filed by Sun Ship with Pennsylvania Supreme Court (Allocatur Docket No. 4259).

June 4, 1979—Petition for allowance of appeal denied by Pennsylvania Supreme Court.

July 19, 1979—Notice of appeal to United States Supreme Court filed by Sun Ship with Pennsylvania Commonwealth Court.

JOSEPH C. KIMMEL

Aug. 28, 1975—Claim Petition pursuant to Pennsylvania Workmen's Compensation Act filed (No. 195-36-0437).

Sept. 19, 1975—Answer filed by Defendant Sun Ship.

Jan. 5, 1976—Hearing before Referee Fred J. Troilo.

Apr. 25, 1977—Decision of Referee awarding benefits filed.

May 24, 1977—Appeal to Workmen's Compensation Appeal Board from Referee's decision filed by Sun Ship (No. A-73220).

July 20, 1977—Hearing before Workmen's Compensation Appeal Board.

Nov. 25, 1977—Opinion of Workmen's Compensation Appeal Board affirming award of Referee filed.

Jan. 9, 1978—Petition to review order of Workmen's Compensation Appeal Board filed by Sun Ship with Pennsylvania Commonwealth Court (No. 33 Commonwealth Docket 1978).

Feb. 8, 1979—Argument before three-member panel of Pennsylvania Commonwealth Court.

Mar. 16, 1979—Opinion and order of Pennsylvania Commonwealth Court affirming order of Workmen's Compensation Appeal Board filed.

Apr. 11, 1979—Petition for allowance of appeal from order of Pennsylvania Commonwealth Court filed by Sun Ship with Pennsylvania Supreme Court (Allocatur Docket No. 4265).

June 4, 1979—Petition for allowance of appeal denied by Pennsylvania Supreme Court.

July 19, 1979—Notice of appeal to United States Supreme Court filed by Sun Ship with Pennsylvania Commonwealth Court.

WILLIE MOORE

Nov. 21, 1975—Claim Petition pursuant to Pennsylvania Workmen's Compensation Act filed (No. 171-26-2668).

Dec. 12, 1975—Answer filed by Defendant Sun Ship.

Jan. 8, 1976—Hearing before Referee Fred J. Troilo.

Apr. 20, 1977—Decision of Referee awarding benefits filed.

May 24, 1977—Appeal to Workmen's Compensation Appeal Board from Referee's decision filed by Sun Ship (No. A-73218).

July 20, 1977—Hearing before Workmen's Compensation Appeal Board.

Nov. 25, 1977—Opinion of Workmen's Compensation Appeal Board affirming award of Referee filed.

Jan. 9, 1978—Petition to review order of Workmen's Compensation Appeal Board filed by Sun Ship with Pennsylvania Commonwealth Court (No. 34 Commonwealth Docket 1978).

Feb. 8, 1979—Argument before three-member panel of Pennsylvania Commonwealth Court.

Mar. 16, 1979—Opinion and order of Pennsylvania Commonwealth Court affirming order of Workmen's Compensation Appeal Board filed.

Apr. 11, 1979—Petition for allowance of appeal from order of Pennsylvania Commonwealth Court filed by Sun Ship with Pennsylvania Supreme Court (Allocatur Docket No. 4266).

June 4, 1979—Petition for allowance of appeal denied by Pennsylvania Supreme Court.

July 19, 1979—Notice of appeal to United States Supreme Court filed by Sun Ship with Pennsylvania Commonwealth Court.

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workmen's Compensation
Harrisburg, Pa. 17120

EMPLOYE'S CLAIM PETITION FOR COMPENSATION FOR DISABILITY

November 19, 1975

John April
309 Donley Avenue
Aston, Pa. 19014
Social Security No. 195-05-9634

v.

Sun Shipbuilding & Dry Dock Co.
Chester, Pa.
Self Insured

To the Workmen's Compensation Board,
Commonwealth of Pennsylvania:

The Claimant respectfully alleges that:

1. The business of my employer was *ship builder and ship repairs.*

2. The date of accident was *February 1975.*

3. The accident occurred while *I was at work.*

4. The nature and cause of the injury was *while chipping piece of metal struck me in the nose, causing a serious impairment and disfigurement.*

5. The following doctors and/or hospitals rendered services

6. (a) I Did _____ request my employer to furnish these services.

(b) The employer did _____ furnish such services.

(c) The amount spent by me for such services was _____.

7. I was disabled from _____ to _____.

8. I have _____ returned to work at my previous occupation and at my former wages which were _____.

9. Notice of the injury was served upon my employer on *February, 1975* by *me* in the following manner *oral notice to my supervisor.*

10. The following facts I also believe important: *claim is made for counsel fee, costs, interest and penalties.*

WHEREFORE, The Claimant asks that your Honorable Board shall make an award in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

/s/ *John April*
305 Donley Avenue
Aston, Pa.

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Occupational Injury and Disease Compensation
Harrisburg, Pa. 17120

DEFENDANT'S ANSWER TO CLAIM PETITION UNDER PENNSYLVANIA WORKMEN'S COMPENSATION ACT

January 5, 1976

JOHN APRIL
309 Donley Avenue
Aston, Pennsylvania 19014
Social Security No. 195-05-9634

v.

SUN SHIPBUILDING & DRY DOCK CO.
Chester, Pennsylvania
Self-insured

TO YOUR HONORABLE REFEREE:

In answer to the captioned claim, the Defendant respectfully pleads as follows:

1. *Admitted.*

2. *The date of the accident is January 8, 1975*

3. *Admitted.*

4. *It is denied that the accident caused the claimant "a serious impairment and disfigurement."*

5.-10. *Admitted.*

As a further matter of defense, the Defendant respectfully states the following:

At the time of the accident, the employer and claimant were within the exclusive jurisdiction of the Federal Longshoremen's and Harbor Workers' Act, and thus the Pennsylvania Bureau of Workmen's Compensation has no jurisdiction of the present claim.

WHEREFORE, the Defendant prays that the claim petition be dismissed or in the alternative disallowed.

/s/ *J. L. Burgess*
Asst. Treasurer

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workmen's Compensation
Harrisburg, Pa. 17120

EMPLOYE'S CLAIM PETITION FOR COMPENSATION FOR DISABILITY

January 8, 1976

CURTIS L. FIELDS
356 N. Redfield Street
Philadelphia, Pa.
Social Security No. 190-34-3285

v.

SUN SHIPBUILDING & DRY DOCK CO.
Chester, Pa.
Self Insurer

TO THE WORKMEN'S COMPENSATION BOARD,
COMMONWEALTH OF PENNSYLVANIA:

The Claimant respectfully alleges that:

1. The business of my employer was *shipbuilding and ship repair.*

2. The date of accident was 5-2-73.

3. The accident occurred while *I was at work cleaning the bottom of a tank.*

4. The nature and cause of the injury was *bumped my head causing a serious and permanent disfigurement; scar over my left eye.*

5. The following doctors and/or hospitals rendered services: *None.*

6. (a) I Did *Yes* request my employer to furnish these services.

(b) The employer did *Yes* furnish such services.

(c) The amount spent by me for such services was *None.*

7. I was disabled from 5-2-73 to 5-6-73.

8. I have *Yes* returned to work at my previous occupation and at my former wages which were ?.

9. Notice of the injury was served upon my employer on 5-2-73 by *me* in the following manner, *oral notice to my Supervisor.*

10. The following facts I also believe important *claim is made for counsel fee costs interest and penalties.*

WHEREFORE the Claimant asks that your Honorable Board shall make an award in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

/s/ *Curtis L. Fields*
356 N. Redfield St.,
Phila., Pa.

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Occupational Injury and Disease Compensation
Harrisburg, Pa. 17120

DEFENDANT'S ANSWER TO CLAIM PETITION UNDER PENNSYLVANIA WORKMEN'S COMPENSATION ACT

February 5, 1976

Curtis Fields
356 N. Redfield Street
Philadelphia, Pennsylvania
Social Security No. 190-34-3285

v.

Sun Shipbuilding & Dry Dock Co.
Chester, Pennsylvania
Self Insured

TO YOUR HONORABLE REFEREE:

In answer to the captioned claim, the Defendant respectfully pleads as follows:

1.-3. *Admitted.*

4. *It is denied that the claimant sustained "a serious and permanent disfigurement".*

5.-6. *Admitted.*

7. *Denied. It is denied that the claimant was disabled. In fact, he lost no time from work.*

8.-10. *Admitted.*

As a further matter of defense, the Defendant respectfully states the following:

At the time of the incident in question, the parties were within the exclusive jurisdiction of the Federal Longshoremen's and Harbor Workers' Compensation Act. Accordingly, the Bureau of Occupational Injury and Disease Compensation has no jurisdiction over the instant claim.

WHEREFORE, the Defendant prays that the claim petition be dismissed or in the alternative disallowed.

/s/ *J. L. Burgess*

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
WORKMEN'S COMPENSATION REFEREES

PETITION SS NO. 190-34-3285

CURTIS L. FIELDS

v.

SUN SHIPBUILDING DRYDOCK COMPANY

Before JEROLD G. KLEVIT, Referee,
First Compensation District,
Philadelphia State Office Building,
Hearing of April 15, 1976.

APPEARANCES:

RONALD J. ARTIGUES, ESQUIRE, 1737 Chestnut Street, Philadelphia, Pa., Attorney for the Claimant.

ANDREW J. FORBES, ESQUIRE, 215 North Olive Street, Media, Pa., Attorney for the Defendant.

REPORTED BY:
Margaret L. Finnell.

---

(3) HEARING OF APRIL 15, 1976.

CLAIMANT'S EVIDENCE.

CURTIS L. FIELDS, 356 North Redfield Street, Philadelphia, Pa., Claimant, having been duly sworn according to law, was examined and testified as follows:

MR. ARTIGUES: Before we begin, Mr. Referee, I would like to advise you that this is a claim for dis-

figurement only. The time lost from work was only minimal.

DIRECT EXAMINATION.

BY MR. ARTIGUES:

Q. Mr. Fields, for the record, would you give us your full name and address?

A. Curtis Fields, 356 North Redfield, Philadelphia.

Q. Who do you work for?

A. At the time I am unemployed.

Q. Who did you last work for?

A. Sun Shipbuilding Drydock Company.

Q. Were you working for Sun Ship on May 2, 1973?

A. Yes, I was.

Q. How long had you worked for them at that time?

A. A little over a year.

Q. Did anything happen to you on that date?

(4) A. Yes, sir.

Q. What happened?

A. I fell on a ladder. I was in a hold working and I was climbing the ladder with a light in my hand because it was dimly lighted in there. We had to carry our own lamps. I slipped because it was greasy and I hit my head on the railing.

Q. What part of your head did you hit?

A. Right here.

Q. You are pointing to above your left eye, indicating above the left eye?

A. Yes.

Q. Did you require medical treatment or attention because of this injury?

A. Yes. I went to the dispensary.

Q. What was done for you there?

A. They put some medication on it and some kind of a bandage they put on it to close the cut.

Q. Did you lose time from work?

A. I laid off four days, I think.

Q. What were your earnings at that time?

A. I can't tell you right off.

Q. Were you working a regular forty hour week at that time?

A. Yes.

Q. This injury that you had that you indicated was above (5) your left eye, did that leave any kind of a scar that you can notice?

A. Yes. There is a scar here.

Q. Could you point to it for the Referee?

A. Right here.

THE REFEREE: Would you describe the scar for the record?

MR. ARTIGUES: I am standing five or six feet away and I see a scar that is in the eyebrow itself on the outer portion of the left eyebrow that is approximately three-quarters of an inch long or an inch long. From this distance it looks like it may be as wide as half an inch in width. It runs parallel to the eyebrow and is in the eyebrow itself. It is mostly noticeable because the hair is not growing where the scar is.

THE REFEREE: Mr. Forbes, do you concur with that description?

MR. FORBES: Well, sir, I am standing about four feet away and I can see a scar that appears to be maybe half an inch long which conforms to the contour of the eyebrow. It is not raised in any fashion and it appears to be perhaps a sixteenth of an inch wide from my vantage point from four feet away.

THE REFEREE: All right. I will evaluate it.

(6) I will put that on the record, and also my observation.

MR. ARTIGUES: I have no further questions.

CROSS EXAMINATION.

BY MR. FORBES:

Q. Mr. Fields, our records indicate that you were being paid $3.64½ at the time of the accident. Does that sound right?

A. That's very possible because I wasn't, you know, exactly sure what it was.

Q. You had no outstanding medical bills at the time as a result of the injury?

A. No, I didn't.

Q. You were in the hold of a ship?

A. Yes.

Q. Was the ship in drydock?

A. Yes, it was.

MR. FORBES: I have no other questions.

(WITNESS EXCUSED)

THE REFEREE: Is that your case?

MR. ARTIGUES: Yes, sir.

MR. FORBES: We have in our answer raised the exclusive jurisdiction of the Federal Longshormen's and Harborworkers' Compensation Act. A petition has been filed on behalf of Mr. Fields, and that petition (7) has been held in abeyance at the request of Mr. Artigues' office.

We would like to submit a legal memorandum on the issue of whether the Federal Act is exclusive

in this case and I would expect to have that within the next two weeks or so.

THE REFEREE: All right. Memorandum to follow. Fine.

(CASE CONTINUED)

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workmen's Compensation
Harrisburg, Pa. 17120

EMPLOYE'S CLAIM PETITION FOR COMPENSATION FOR DISABILITY

February 5, 1976

FRANK JANUZCIEWICZ
1112 Brown Street
Chester, Pa.
Social Security No. 195-12-9304

v.

SUN SHIPBUILDING & DRYDOCK CO.
Chester, Pa.
Self-Insurer

TO THE WORKMEN'S COMPENSATION BOARD,
COMMONWEALTH OF PENNSYLVANIA:

The Claimant respectfully alleges that:

1. The business of my employer was *shipbuilder.*

2. The date of accident was *Jan., 1974 on or about 1/15/74.*

3. The accident occurred while *I was at work.*

4. The nature and cause of the injury was *A metal washer struck me on the forehead causing a serious and permanent disfigurement.*

5. The following doctors and/or hospitals rendered services. _____.

6 (a) I Did _____ request my employer to furnish these services.

(b) The employer did _____ furnish such services.

(c) The amount spent by me for such services was _____.

7. I was disabled from _____ to _____.

8. I have _____ returned to work at my previous occupation and at my former wages which were _____.

9. Notice of the injury was served upon my employer on _____ by *me* in the following manner *oral notice to my Supervisor.*

10. The following facts I also believe important *Claim is made for counsel fee, costs, penalty and interest.*

WHEREFORE the Claimant asks that your Honorable Board shall make an award in accordance with the provisions of the Pennsylvania Workmen's Compensation Act. Enter my appearance for petitioner:

/s/ *Frank Januzciewicz*
1112 Brown Street
Chester, Pa.

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Occupational Injury and Disease Compensation
Harrisburg, Pa. 17120

DEFENDANT'S ANSWER TO CLAIM PETITION UNDER PENNSYLVANIA WORKMEN'S COMPENSATION ACT

Frank Januociewicz
1112 Brown Street
Chester, Pennsylvania
Social Security No. 195-12-9304

v.

Sun Shipbuilding & Dry Dock Co.
Chester, Pennsylvania
Self Insured

To Your Honorable Referee:

In answer to the captioned claim, the Defendant respectfully pleads as follows:

1-3. *Admitted.*

4. Denied. It is denied that the claimant sustained a "serious and permanent disfigurement".

5-10. Admitted.

As a further matter of defense, the Defendant respectfully states the following:

At the time of the accident, the claimant and the employee were within the exclusive jurisdiction of the

Federal Longshoremen's and Harbor Workers Act. Indeed, the claimant has filed a Petition under the said Act seeking recovery for the incident in question. Therefore, it is submitted that the Bureau of Occupational Injury and Disease Compensation has no jurisdiction over the subject claim.

Wherefore, the Defendant prays that the claim petition be dismissed or in the alternative disallowed.

/s/ J. L. Burgess

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workmen's Compensation
Harrisburg, PA 17120

EMPLOYE'S CLAIM PETITION FOR COMPENSATION FOR DISABILITY

August 13, 1975

JOSEPH C. KIMMEL
Apt. H-1, 230 Pennell Rd.,
Aston, Pa. 19014
Social Security No. 195-36-0437

v.

SUN SHIPBUILDING & DRYDOCK CO.
Ft. of Morton Ave., Chester, Pa.
self-insurer

TO THE WORKMEN'S COMPENSATION BOARD,
COMMONWEALTH OF PENNSYLVANIA:

The Claimant respectfully alleges that:

1. The business of my employer was *shipbuilder.*

2. The date of accident was 6-2-75.

3. The accident occurred while *I was working.*

4. The nature and cause of the injury was *I was poked in the face with a hot rod wire causing a serious and permanent disfigurement.*

5. The following doctors and/or hospitals rendered services *shipyard dispensary.*

6. (a) I Did _____ request my employer to furnish these services.

(b) The employer did _____ furnish such services.

(c) The amount spent by me for such services was _____.

7. I was disabled from _____ to _____.

8. I have _____ returned to work at my previous occupation and at my former wages which were _____.

9. Notice of the injury was served upon my employer on *6-2-75* by *me* in the following manner *oral notice to my supervisor.*

10. The following facts I also believe important _____.

WHEREFORE the Claimant asks that your Honorable Board shall make an award in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

/s/ Joseph C. Kimmel
230 Pennell Rd., Apt. H-1,
Aston, Pa. 19014

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Occupational Injury and Disease Compensation
Harrisburg, Pa. 17120

DEFENDANT'S ANSWER TO CLAIM PETITION UNDER PENNSYLVANIA WORKMEN'S COMPENSATION ACT

September 15 1975

Joseph C. Kimmel
230 Pennell Road
Aston, Pennsylvania
Social Security No. 195-36-0437

v.

Sun Shipbuilding & Dry Dock Co.
Foot of Morton Avenue
Chester, Pennsylvania
Self-insured

To Your Honorable Referee:

In answer to the captioned claim, the Defendant respectfully pleads as follows:

1-10. *All allegations of the employee's claim petition are admitted with the exception of the legal conclusion that the employee sustained a "serious and permanent disfigurement". Formal proof of this allegation is demanded.*

As a further matter of defense, the Defendant respectfully states the following:

11. At the time of the accident, the Employer's Shipyard and the area where the accident occurred were within the exclusive jurisdiction of the Federal Longshoremen's and Harbor Workers' Compensation Act. Accordingly, it is therefore averred that the Pennsylvania Bureau of Workmen's Compensation has no jurisdiction over the matter.

Wherefore, the Defendant prays that the claim petition be dismissed or in the alternative disallowed.

/s/ *G. C. Liacouras,*
Vice President-Treasurer

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Workmen's Compensation
Harrisburg, Pa. 17120

EMPLOYE'S CLAIM PETITION FOR COMPENSATION FOR DISABILITY

November 5, 1975

Willie Moore
1707 W. 7th Street
Chester, Pa.
Social Security No. 171-26-2668

v.

Sun Shipbuilding & Dry Dock Co.
Chester, Pa.
Self Insured

TO THE WORKMEN'S COMPENSATION BOARD,
COMMONWEALTH OF PENNSYLVANIA:

The Claimant respectfully alleges that:

1. The business of my employer was *builder.*

2. The date of accident was *5-13-73.*

3. The accident occurred while *I was at work.*

4. The nature and cause of the injury was *struck with a mall causing a serious and permanent facial disfigurement.*

5. The following doctors and/or hospitals rendered services *Company dispensary.*

6 (a) I Did _____ request my employer to furnish these services.

(b) The employer did _____ furnish such services.

(c) The amount spent by me for such services was _____.

7. I was disabled from _____ to _____.

8. I have _____ returned to work at my previous occupation and at my former wages which were _____.

9. Notice of the injury was served upon my employer on *5-13-73* by *me* in the following manner *oral notice to my supervisor.*

10. The following facts I also believe important _____ _____.

WHEREFORE the Claimant asks that your Honorable Board shall make an award in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

/s/ *Willie Moore*
1707 W. 7th Street
Chester, Pa.

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Commonwealth of Pennsylvania
Department of Labor and Industry
Bureau of Occupational Injury and Disease Compensation
Harrisburg, Pa. 17120

DEFENDANT'S ANSWER TO CLAIM PETITION UNDER PENNSYLVANIA WORKMEN'S COMPENSATION ACT

December 8, 1975

Willie Moore
1707 West 7th Street
Chester, Pennsylvania
Social Security No. 171-26-2668

v.

Sun Shipbuilding & Dry Dock Co.
Chester, Pennsylvania
Self-insured

To Your Honorable Referee:

In answer to the captioned claim, the Defendant respectfully pleads as follows:

1. *Admitted.*

2-4. *Denied. Employee is without sufficient evidence to confirm or deny the claimant's allegations concerning the happening of the accident or the date thereof. In addition, it is denied that the employee sustained a "serious and permanent disfigurement" as defined by the Act.*

5-9. *Admitted.*

As a further matter of defense, the Defendant respectfully states the following:

On April 29, 1974, a claim was filed on behalf of the employee under the Federal Longshoremen's and Harbor Worker's Compensation Act, as amended, arising from the same alleged accident as is the subject of the present petition.

10. *The area where the accident is alleged to have occurred was at the time, of the alleged accident, within the exclusive jurisdiction of the Federal Longshoremen's and Harbor Worker's Act. It is therefore averred that the Commonwealth of Pennsylvania has no jurisdiction in the present matter.*

Wherefore, the Defendant prays that the claim petition be dismissed or in the alternative disallowed.

/s/ J. C. Burgess

[Entry of Appearance and Notary's Affidavit Omitted in Printing.]

Supreme Court, U. S.
FILED
NOV 21 1979
MICHAEL RODAK, JR., CLERK

No. 79-343

IN THE

Supreme Court of the United States

October Term, 1979

SUN SHIPBUILDING & DRY DOCK COMPANY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD,

JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH KIMMEL AND WILLIE MOORE,

Appellees

On Appeal from the Supreme Court of the State of Pennsylvania

---

MOTION OF APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT BELOW

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Appellees

MOTION OF APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT BELOW

Appellees move to dismiss this appeal from the judgment of the Commonwealth Court of Pennsylvania, dated March 16, 1979, or alternatively to affirm the decision below.[1] The opinion and order of the Commonwealth Court are reported at 398 A.2d 1111 (1979). The Supreme Court of Pennsylvania denied Appellant's petitions for allowance of appeal to that court on June 4, 1979.

QUESTION PRESENTED

Whether Congress, by its 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), intended to preempt an award of workmen's compensation benefits pursuant to a state statute such as the Pennsylvania Workmen's Compensation Act, with respect to claims falling within the coverage of the LHWCA and state law.

---

[1] This appeal may not have been properly taken since "the *validity* of a statute of any state" was not drawn in question in the court below. 28 U.S.C. § 1257(2) (emphasis added).

STATEMENT OF THE CASE

Appellees were injured during the period from 1973 through 1975 in the course of their employment with Appellant Sun Shipbuilding & Dry Dock Company. Each Appellee sustained a facial disfigurement, which is compensable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c)(20), and under the Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, § 513(c)(22). While the maximum award for that type of injury under the LHWCA is $3,500, the Pennsylvania Act permits payment of an amount up to $62,425 (275 weeks at $227 per week) in compensation for a serious and permanent disfigurement. Moreover, contested disfigurement claims under the LHWCA may take up to 18 months to process, while a state claim may be adjudicated in 6 to 8 weeks. Therefore, an injured claimant may be substantially advantaged by proceeding under state law in situations involving facial disfigurement.

Each Appellee sought compensation under the Pennsylvania Act. Their claims were sustained by the Pennsylvania Workmen's Compensation Appeal Board, which rejected Appellant's contention "that jurisdiction under the Pennsylvania Workmen's Compensation Act . . . ha[d] been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act. . . ." Jurisdictional Statement, p. A19. The Commonwealth Court of Pennsylvania sustained the Board's jurisdictional ruling, and the Pennsylvania Supreme Court denied Appellant's petitions for allowance of appeal.

ARGUMENT

As appellant acknowledges, this Court's decisions establish that, when faced with a preemption challenge to state legislation, the Court starts "with the asumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978). Appellant's contentions fall far short of demonstrating that Congress clearly and manifestly intended to preempt the operation of state workmen's compensation laws in a case such as this.

Appellant makes much of the fact that the 1972 amendments changed the LHWCA from a "gapfiller" to an affirmative exercise of federal jurisdiction. Relatedly, Appellant contends that Congress' determination to accomplish this change partly by broadening the definition of "navigable waters"—a term assertedly associated with exclusive federal admiralty jurisdiction—shows a preemptive intent. We submit, however, that Congress' final abandonment of the "gapfiller" notion only *poses* the question whether the federal statute was intended to preempt state law when coverage overlaps; it does not resolve it. That Congress has elected to make a remedy available for all injuries occurring in certain circumstances is as consistent with an intention to allow injured workers a choice between state and federal remedies when both are applicable as it is with an intention to preempt state remedies. Further, it is immaterial that the change was accomplished in part by broadening the definition of "navigable waters" for purposes of the statute because even prior to the 1972 amendments injuries sustained actually on land, but over "navigable waters" as defined in the Act, were compensable under either state or federal law. See *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 129 (1962). In any case, it is certainly not clear or manifest that the definitional change was anything more than a simple expedient.[2]

Appellant's reliance on the "exclusivity" language in § 5(a) of the Act, 33 U.S.C. § 905(a), is also misplaced. As

---

[2] See also *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973):

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must

Appellant acknowledges, this language was part of the Act prior to the 1972 amendments. Nonetheless, as Appellant concedes, federal law did not preempt all operations of state law during that period. See *Calbeck* v. *Travelers Insurance Co., supra.* Although § 5(a) may preclude recovery under other overlapping *federal* schemes, see *White* v. *Norfolk & Western Ry. Co.,* 217 Va. 823. 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977); *Poche* v. *Avondale Shipyards, Inc.,* 339 So.2d 1212, 1216 (La. 1976), appeal dismissed for want of jurisdiction sub nom. *Territo* v. *Poche,* 434 U.S. 803 (1977),[3] it does not manifestly preclude recourse to state law any more now than it did before 1972.

Appellant contends, nevertheless, that concurrent jurisdiction is inconsistent with the purpose of the 1972 amendments, as shown by the legislative history. Appellant perceives a congressional intent to ensure adequate and uniform benefits for injured longshoremen. Appellant argues that both objectives can be achieved only if federal jurisdiction is exclusive. Otherwise, a claimant might seek a state remedy less beneficial than the federal one, and benefits will vary depending on what law is applied.

The legislative history on which Appellant relies, however, may best be understood as expressing a concern for *uniformly adequate* coverage. To accomplish that objective, Congress provided a floor that assures injured employees an opportunity for specified benefits regardless of the state in which the injury occurred. Allowing a claimant to pur-

sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. . . .

Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

[3] The Solicitor General filed an *Amicus* Brief with this Court in *Poche* arguing that the LHWCA does not preempt state law. He contended, *inter alia,* that § 5(a) was not directed at the exclusion of remedies against an employer under other workmens' compensation laws. *Amicus* Brief, pp. 11-12.

sue a state remedy potentially more favorable than the federal remedy is not inconsistent with the congressional objective. And Appellant's concern that a particular claimant might do worse under state law than under federal law is completely conjectural in this case.

It is far from clear that Congress intended its 1972 amendments to the LHWCA to preclude concurrent state jurisdiction.[4] The decisions of the Workmen's Compensation Appeal Board and the Commonwealth Court, on which we rely, adequately establish that proposition. Further, as Appellant acknowledges, other courts that have expressly

[4] Appellant raises an independent challenge to the Commonwealth Court's disposition of the claims of John April and Curtis Fields on the ground that both were injured while repairing ships located in dry docks at Sun Ship's yard. Appellant contends that dry docks have always been considered part of the navigable waters and hence within the area of federal exclusive jurisdiction. Appellant argues that "the Pennsylvania court has concluded that, beyond not intending to preempt state compensation laws for injuries to maritime workers occurring on land in 1972, Congress was also sanctioning an expansion of state jurisdiction over areas previously under exclusive federal jurisdiction as a matter of constitutional law [i.e., by operation of the Admiralty Clause]." Jurisdictional Statement, p. 23. Appellant did not clearly place this claim in issue in the proceedings below. Both the Commonwealth Court and the Appeal Board understood the only claim to be that the 1972 amendments, by operation of the Supremacy Clause, preempted jurisdiction under the Pennsylvania Workmen's Compensation Act where it previously existed. See Jurisdictional Statement, pp. A4, A19, A26. Therefore, this claim is not properly before the Court.

In any event, the claim is without basis. *Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114 (1962), made clear that an injury to a longshoreman on a dry dock was recompensable under both federal and state law. Federal law could apply because the LHWCA covered injuries on navigable waters, defined as including any dry dock. "At the same time, since the injury did, in a physical sense, occur on land, there is little doubt that a state compensation act could validly have been applied to it." *Id.* at 129.

decided the issue are in accord. *Poche* v. *Avondale Shipyards, Inc., supra; Murray* v. *City of Augusta,* 394 A.2d 1171 (Me. 1978); *Johnson* v. *Texas Employers Insurance Ass'n,* 558 S.W.2d 47 (Tex. Ct. Civ. App. 1977). See also *Newport News Shipbuilding & Dry Dock Co.* v. *Director,* 583 F.2d 1273 (4th Cir. 1978); *Umbehagen* v. *Equitable Equipment Co.,* 329 So.2d 245 (La. Cir. Ct. App. 1976); 4A Larson, The Law of Workmen's Compensation §§ 89.52-53, 89-70 (1979); Gilmore & Black, Law of Admiralty 425-26 (2d ed. 1975). Finally, interpreting the Act to allow recourse to more favorable state remedies is consistent with the Act's remedial nature.

CONCLUSION

The appeal should be dismissed because it does not present a substantial federal question. In the alternative, the decision below should be affirmed.

Respectfully submitted,

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FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

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No. 79-343.

SUN SHIP, INC.,

Appellant,

v.

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Appellees.

On Appeal From the Commonwealth Court of Pennsylvania.

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Appellees.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR THE APPELLANT.

OPINIONS BELOW.

The opinion of the Commonwealth Court of Pennsylvania (J. S. App., pp. A1-A10) is officially reported at 41 Pa. Commw. 302 and unofficially reported at 398 A. 2d 1111. The opinions of the Pennsylvania Workmen's Compensation Appeal Board (J. S. App., pp. A18-A53) and the referees' decisions (J. S. App., pp. A54-A72) are not reported.

JURISDICTION.

The order of the Commonwealth Court of Pennsylvania was entered on March 16, 1979. (J. S. App., pp. A8-A10). Appellant Sun Ship, Inc. filed petitions for allowance of appeal from this order with the Pennsylvania Supreme Court which were denied by that court on June 4, 1979. (J. S. App., pp. A11-A15). On July 19, 1979 Sun Ship, Inc. docketed a notice of appeal to this Court with the Commonwealth Court (J. S. App., pp. A16-A17 and filed its Jurisdictional Statement on August 31, 1979. Probable jurisdiction was noted on January 7, 1980.

The jurisdiction of this Court rests upon 28 U. S. C. § 1257(2) because this appeal draws in question the validity of the application of the Pennsylvania Workmen's Compensation Act as being repugnant to the Constitution and laws of the United States, and the decision of the Commonwealth Court is in favor of the validity of the application of the state statute. *Huron Portland Cement Co. v. City of Detroit,* 362 U. S. 440 (1960); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282 (1921).

CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. United States Constitution, Art. III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. United States Constitution, Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 2(3), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 902(3):

> When used in this chapter—
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

4. Section 3, Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 903:

> COVERAGE.
>
> (a) Compensation shall be payable under this chapter in respect of disability or death of an em-

ployee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

> (1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or
>
> (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.
>
> (b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

5. Section 5(a), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 905(a):

> EXCLUSIVENESS OF LIABILITY.
>
> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

6. Section 101, Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*, Pa. Stat. Ann. tit. 77, § 1 (Purdon):

> SHORT TITLE; APPLICATION OF ACT.
>
> That this act shall be called and cited as The Pennsylvania Workmen's Compensation Act, and shall apply to all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extraterritorially as provided by section 305.2.

QUESTION PRESENTED.

Whether the Pennsylvania Workmen's Compensation Act is repugnant to the Supremacy Clause or the Admiralty Clause of the United States Constitution when applied to permit the exercise of jurisdiction thereunder over a claim for an injury to a maritime worker which falls within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT OF THE CASE.

This appeal involves five workers' compensation claims filed under the Pennsylvania Workmen's Compensation Act (the "Pennsylvania Act") [1] for alleged disfigurements sustained by the claimants while employed by Sun Ship, Inc. ("Sun Ship"). Sun Ship is a company engaged in shipbuilding and ship repair at its yard located on the Delaware River, a navigable water of the United States, in Chester, Pennsylvania (App., pp. 7a, 11a, 20a, 24a). At the time of injury, each of the five claimants was employed at Sun Ship's yard and was engaged in shipbuilding or ship repair activity (App., pp. 7a, 11a, 20a, 24a, 28a). Each of the injuries occurred after November 26, 1972, the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (the "Longshoremen's Act") [2] (App., pp. 7a, 11a, 20a, 24a, 28a). It was undisputed that all of the claims involved here are within the coverage of the Longshoremen's Act.

Each claimant, nevertheless, filed a claim under the Pennsylvania Act, rather than the Longshoremen's Act,

1. Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*, Pa. Stat. Ann. tit. 77, § 1 *et seq.* (Purdon).

2. Act of March 4, 1927 ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 901 *et seq.*

and was awarded benefits. Sun Ship sought dismissal of each state claim on the ground that the claimant's exclusive remedy was the one provided by the Longshoremen's Act, particularly in view of the 1972 amendments to that Act which plainly evidenced Congress' intent to preempt state law (App., pp. 10a, 14a, 22a-23a, 27a, 31a).

The Commonwealth Court, an intermediate appellate court of Pennsylvania, concluded that the Longshoremen's Act unquestionably applies to each of these cases.[3] Despite this conclusion, it held that benefits could be awarded under the Pennsylvania Act because jurisdiction under the state and federal statutes is concurrent. 41 Pa. Commw. 302, 398 A. 2d 1111 (J. S. App., pp. A1-A10). The Supreme Court of Pennsylvania denied Sun Ship's petitions for allowance of appeal from the decision of the Commonwealth Court (J. S. App., pp. A11-A15), and thereafter Sun Ship filed its appeal in this Court (J. S. App., pp. A16-A17).

3. Pursuant to the Pennsylvania Act, these claims were initially heard by referees. In *Fields*, the referee held jurisdiction under the Longshoremen's Act to be exclusive and dismissed the claim. (J. S. App., pp. A58-A60). The referee in the other four cases awarded benefits, finding concurrent jurisdiction. (J. S. App., pp. A54-A57, A61-A72). All five cases were appealed to the Pennsylvania Workmen's Compensation Appeal Board which reversed *Fields* and affirmed the other cases. (J. S. App., pp. A18-A53). Sun Ship filed petitions to review the Board's orders with the Commonwealth Court.

SUMMARY OF THE ARGUMENT.

When Congress enacts constitutionally valid legislation which is intended to cover a field completely, the states are precluded from enacting or enforcing statutes governing the same field by virtue of the Supremacy Clause of the Constitution. Art. VI, cl. 2. This preclusive effect is even more forcefully felt when the federal legislation constitutes an exercise of Congress' paramount power to define the uniform maritime law pursuant to the Admiralty Clause of the Constitution. Art. III, § 2. *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). This intent to occupy a particular field is found where the statutory language or legislative history of an Act of Congress evidences a pervasive and comprehensive plan of federal regulation; where the legislation under review affects an area imbued with a dominant federal interest; or where the object and character of the congressional enactment reveal a purpose to occupy the field. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Even when Congress has not totally foreclosed state regulation, if state law conflicts with a valid federal statute or if the operation of the state law frustrates the achievement and implementation of a congressional purpose, the state law must yield to the superior command of the federal statute. *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978). The 1972 amendments to the Longshoremen's Act embody a clear congressional intent to preempt state law in the field of maritime workers' compensation; to permit state law to operate would frustrate the congressional purpose.

The legislative initiative in 1972, which represented the first major overhaul of the Longshoremen's Act since its enactment, was made in the context of the settled principles that the nature of the maritime law demands national uniformity and that Congress has the paramount power to

determine what the content of that uniform maritime law will be. Within this field of uniform maritime law, the states may not trespass. *Southern Pacific Co. v. Jensen, supra.*

Federal power in admiralty extends over both maritime torts and maritime contracts. Admiralty jurisdiction in tort is traditionally limited by geography, while admiralty contract jurisdiction encompasses the whole range of agreements affecting navigation, commerce and business of the sea. *Nacirema Operating Co. v. Johnson*, 396 U. S. 212, 223-24 (1969). The language of the 1972 amendments makes clear that Congress was exercising its admiralty power in both tort and contract to create a uniform national system for maritime workers' compensation preemptive of state law.

First, Congress substantially broadened the definition of the term "navigable waters of the United States" in Section 3(a) of the Act and thereby brought within the Act's coverage injuries occurring upon land areas adjoining the actual navigable waterway including locations and facilities where longshoring and shipbuilding activities traditionally take place. Second, the 1972 amendments defined the persons covered by Section 2(3) of the Act to include all longshoremen and harbor workers specifically including ship repairmen, shipbuilders and shipbreakers. Finally, Congress deleted the "may not . . . validly be provided by State law" limitation on the Act's coverage contained in the original statute, thereby eliminating language which both reflected and contributed to considerable confusion about the availability of federal and state compensation remedies at or near the water's edge for many years. *See, e.g., Calbeck v. Travelers Insurance Co.*, 370 U. S. 114 (1962). It was this language, in combination with the "maritime but local" exception developed in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922), to mitigate

Jensen's perceived harshness, which had created the insoluble jurisdictional dilemma in early cases decided under the original Longshoremen's Act. This Court attempted to resolve the dilemma with the "twilight zone" doctrine in *Davis v. Washington Department of Labor and Industries*, 317 U. S. 249 (1942), and later in *Calbeck v. Travelers Insurance Co., supra,* which was read as creating an area where federal and state jurisdiction were concurrent. The difficulties persisted landward of that line, however, until *Nacirema Operating Co. v. Johnson, supra,* in which this Court denied recovery under the Act to a longshoremen injured on land.

It was this resolution of the problem in defining the line between state and federal coverage which Congress rejected when it expanded the Act's coverage landward in 1972. Only by deleting the "may not . . . validly be provided by State law" limitation from the amended Act could Congress assure itself that the comprehensive remedy set forth in the 1972 amendments would be uniformly applied both seaward and landward of the *Jensen* line. When these three amendments are read in conjunction with other provisions of the Act which provide that the federal remedy is both mandatory and exclusive for all claims within the Act's coverage, Congress' intent to preempt state law is plain.

Congress' intent to preempt state law is further evidenced by the legislative history to the 1972 amendments, wherein the Committees considering the legislation stated their concern that the benefits payable to an injured maritime worker "should not depend on the fortuitous circumstances of whether the injury occurred on land or over water." Moreover, the Committee Reports recognized that the inadequacy of benefits under the laws of most states would result in disparity of treatment among maritime workers of the same employer "if State laws are permitted to continue to apply to injuries occurring on

land." Thus, each Committee concluded, "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. No. 1125, 92d Cong., 2d Sess. 12-13 (1972); H. R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972).

The historical dominance of the federal interest in maritime matters in general and compensation for employment-related injuries for maritime workers in particular also supports the finding that state law may not occupy this field concurrently with the Longshoremen's Act. When this dominant interest is expressed in a statute such as the Longshoremen's Act which completely defines the substantive law, the procedure and the remedies to be applied to claims covered thereby, the states are precluded from applying state law governing the same matters, even if that law is intended to complement or supplement the federal scheme. *Hines v. Davidowitz*, 312 U. S. 52, 66-67 (1941).

This dominant federal interest in providing a uniform compensation remedy for claims such as those before this Court, which are plainly covered by the Act, is not any less pervasive merely because the Act's coverage ends at some point landward of the water's edge. *See New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 153-54 (1917); *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 174 (1917). Congress has determined how best to compensate maritime workers for employment-related injuries and has provided a complete system for so doing; it is no longer open to the states to decide that this system is inadequate or to supplant it with their own compensation schemes for claims covered by the Longshoremen's Act.

Indeed, the very completeness of the Longshoremen's Act, in combination with the equally complete but sub-

stantially different scheme embodied in the Pennsylvania Act (and that of almost every state), means that conflicts will necessarily arise if concurrent jurisdiction exists as employers attempt to comply with the differing obligations and procedures imposed by the federal and state systems. Because such conflicts occur at almost every point where the Longshoremen's Act and the Pennsylvania Act speak to a particular issue, state law must be wholly displaced. Moreover, decisions since the 1972 amendments have shown that a theory of concurrent jurisdiction which allows claimants to elect state law remedies will stand as an obstacle to the accomplishment of Congress' purpose to provide an adequate and uniform federal remedy by precluding that claimant from pursuing his claim under the Longshoremen's Act. *Landry v. Carlson Mooring Service,* 9 BRBS 518 (1978). Thus, by every measure, the Longshoremen's Act as amended preempts state law, and Pennsylvania's exercise of jurisdiction over these compensation claims must be reversed.

ARGUMENT FOR APPELLANT.

The Commonwealth Court concluded that Pennsylvania may constitutionally apply its workers' compensation law to afford claimants benefits thereunder even though each claim indisputably falls within the coverage of the Longshoremen's Act. The following sections of the argument will show that this holding is in error because it contravenes the plain intent of Congress to preempt state law with a uniform federal compensation system when it enacted the sweeping amendments to the Longshoremen's Act in 1972.

I. The Supremacy Clause of the Constitution Precludes the States From Enforcing Legislation When Congress Preempts a Particular Field With Uniform Legislation National in Scope.

When Congress enacts legislation within its constitutional authority which is intended to cover a particular field completely, the Supremacy Clause of the Constitution, Art. VI, cl. 2, operates to deprive the states of the power to enact or enforce legislation governing that field, even when a state would be free to act absent federal legislation. The standards for determining when Congress intends to preempt a subject to the exclusion of state law are detailed in this Court's recent decision in *Ray v. Atlantic Richfield Co.,* 435 U. S. 151 (1978), *quoting Rice v. Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947):

> "[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n,* 250 U. S. 566, 569; *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148. Or the Act of Congress may

touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz,* 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission,* 236 U. S. 439; *Charleston & W. C. R. Co. v. Varnville Co.,* 237 U. S. 597; *New York Central R. Co. v. Varnville Co.,* 237 U. S. 597; *New York Central R. Co. v. Winfield,* 244 U. S. 147; *Napier v. Atlantic Coast Line R. Co., supra.*"

Accord, *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U. S. 624, 633 (1973).

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U. S. 52, 67 (1941); *Jones v. Rath Packing Co., supra,* at 526, 540-541. Accord, *De Canas v. Bica,* 424 U. S. 351, 363 (1976).

435 U. S. at 157-58.

When the 1972 amendments to the Longshoremen's Act are analyzed against these standards, Congress' intent to preempt state compensation statutes is manifest. The principal source for determining congressional intent is the relevant statutory language. Analysis of the provisions of the Longshoremen's Act, as amended in 1972, is facilitated by briefly reviewing the relationship between the federal government and the maritime law which formed the basis for this legislative initiative in the field of maritime workers' compensation.

II. The Nature of the Maritime Law Demands National Uniformity and Congress Has the Paramount Power to Determine What That Law Will Be.

In 1917 this Court decided the landmark case of *Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917). In *Jensen* an employee of the railroad was killed while unloading cargo from a steamship owned by the railroad. At the time of his fatal injury he was on board the ship, which was berthed in the navigable waters of New York harbor. Jensen's widow and children were awarded benefits under New York's workers' compensation statute. In reversing the state court's confirmation of that award, this Court stated the rule of federal uniformity in admiralty and maritime matters in constitutional terms:

> And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

244 U. S. at 216.[4]

4. The *Jensen* court concluded that the need for uniformity in maritime matters was so great that even the federal remedy provided to railroad employees by the Federal Employers' Liability Act could not apply to the facts of *Jensen.* 244 U. S. at 212.

The source of this doctrine is the Admiralty Clause of the Constitution, which extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." Art. III, § 2. *Jensen* further recognized that the development of the substantive law to be applied in this area of admiralty jurisdiction where national uniformity is required is not a matter solely for the federal courts. Under the Necessary and Proper Clause of the Constitution, Art. I, § 8, Congress has legislative authority over all powers vested in any department of the United States. Thus, the *Jensen* Court concluded, "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." 244 U. S. at 215.

These principles—the need for uniformity in the maritime law and Congress' supreme authority to state that law—have guided and determined the course of the law of compensation for maritime workers. When *Jensen* was decided in 1917, Congress had not exercised its authority to enact a uniform federal statute to provide a system of compensation for maritime workers, and no remedy of this type was available under the maritime law for longshoremen or harbor workers. The effect of *Jensen*, therefore, was to deny compensation to that class of maritime workers injured over the navigable waters for whom the principle of uniformity precluded the application of state law. The perceived harshness of this result led to a series of decisions which attempted to define limitations upon and exceptions to the uniformity principle, and thus provide a state compensation remedy to some of these amphibious workers. *E.g., Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922). The principle itself was never abandoned, however, despite persistent attempts to have *Jensen* overruled.

The second principle of *Jensen*, by contrast, was not limited by subsequent decisions. To the contrary, this

Court's decisions have consistently recognized that Congress has the power to extend the scope of the maritime law, as well as to modify the applicable substantive legal principles. *E.g., Gutierrez v. Waterman Steamship Co.*, 373 U. S. 206 (1963) (applying Admiralty Extension Act of 1948 to allow suit in admiralty for unseaworthiness for injuries caused by vessel to longshoremen working on the dock); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943) (holding Jones Act remedy available to seamen injured on land).

In two cases decided shortly before the passage of the 1972 amendments to the Longshoremen's Act, this Court invited Congress to exercise this authority to extend the reach of federal admiralty jurisdiction in the field of maritime workers' compensation. In both *Nacirema Operating Co. v. Johnson*, 396 U. S. 212 (1969), and *Victory Carriers, Inc. v. Law*, 404 U. S. 202 (1971), longshoremen injured on piers while loading or unloading vessels pursued federal remedies for their injuries.[5] However, because Congress had not exercised its legislative authority in admiralty to include these workers under existing federal legislation, the Court felt bound to deny federal remedies. The Court's opinion in each case confirms Congress' power to afford such remedies. As stated in *Nacirema*:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide

5. In *Nacirema*, the longshoreman sought compensation under the Longshoremen's Act, while in *Victory Carriers* the action was brought against the vessel for unseaworthiness.

> with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U. S. at 223-24.

In the same term as *Nacirema,* this Court reaffirmed the principle of national uniformity in the maritime law in *Moragne v. States Marine Lines,* 398 U. S. 375 (1970), which overruled *The Harrisburg,* 119 U. S. 199 (1886), by allowing an action for wrongful death under federal maritime law. The Court thus ended the anomalous situation which had developed whereby the representative of an individual who met his death beyond state territorial waters was afforded a uniform federal remedy under the Death on the High Seas Act, while the representative of an individual who died in the territorial waters of a state was relegated to the wrongful death statute of that state, as incorporated into the federal maritime law. *See Hess v. United States,* 361 U. S. 314 (1960); *The Tungus v. Skovgaard,* 358 U. S. 588 (1959). Thus, while the Court was unable to further the uniformity principle in *Nacirema* because of the perceived limitations in the original Longshoremen's Act, it did invoke that principle in *Moragne*:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. *Such uniformity* not only will further the concerns of both [the Jones Act and the Death on the High Seas Act] but also *will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country."* *The Lottawanna,* 21 Wall. 558, 575 (1875).

398 U. S. at 401-02 (citations omitted; emphasis supplied).

Against this background of the Court's affirmation of Congress' constitutional power to expand the scope of maritime jurisdiction and the uniformity principle embodied in decisions such as *Jensen* and *Moragne,* Congress passed the 1972 amendments to the Longshoremen's Act.

III. The Language of the Longshoremen's Act as Amended Establishes a Uniform and Exclusive System of Compensation for Maritime Workers.

The 1972 amendments completely overhauled the provisions of the Longshoremen's Act to remedy several problems which had arisen in the Act's administration and to reform the judicial gloss of the Act which had developed since its enactment in 1927. *Northeast Marine Terminal Co. v. Caputo,* 432 U. S. 249, 260-62 (1977). For present purposes, the most significant problem addressed by Congress was the disparity which had developed as a result of limiting federal coverage only to those maritime workers injured seaward of the water's edge, thereby relegating the workers injured on land to state compensation remedies. *Id.* at 262-65. Congress' response to this situation

was direct: it extended the scope of the Act's coverage to include maritime workers injured on land.

First, Congress extended the coverage landward by broadening the definition of "navigable waters of the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Longshoremen's Act § 3(a), 33 U. S. C. § 903(a). This expansion comports with the notion that maritime tort jurisdiction is "bounded by locality," *Nacirema Operating Co. v. Johnson,* 396 U. S. 212, 215 n. 7 (1969), but it also manifests Congress' power to define what that locality will be.[6]

The scope of the Act's coverage was also clarified by defining the entire class of persons covered by the statute:

> *The term "employee" means any person engaged in maritime employment, including* any longshoreman or other persons engaged in longshoring operations, and *any harborworker including a ship repairman, shipbuilder, and shipbreaker,* but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Longshoremen's Act § 2(3), 33 U. S. C. § 902(3) (emphasis supplied). These provisions establish a two-part test for coverage under the Act: a geographical test

6. Prior to 1972, § 3(a) defined navigable waters to include only the actual navigable waters and any dry dock. There can be no doubt that Congress' redefinition of "navigable waters," limited as it is to those areas on land where longshoring, shipbuilding and ship repair functions are performed, is within its legislative power in admiralty. *Dravo Corp. v. Maxin,* 545 F. 2d 374, 377 (3d Cir. 1976), *cert. denied,* 433 U. S. 908 (1977); *Sea-Land Service, Inc. v. Director,* 540 F. 2d 629, 636 (3d Cir. 1976); *see Northeast Marine Terminal Co. v. Caputo,* 432 U. S. 249 (1977); *Gutierrez v. Waterman Steamship Co.,* 373 U. S. 206 (1963).

("situs") and a nature of employment test ("status"), thereby departing from the original Longshoremen's Act which defined coverage solely in terms of situs. *P. C. Pfeiffer Co. v. Ford,* 100 S. Ct. 328, 333 (1979); *Northeast Marine Terminal Co. v. Caputo,* 432 U. S. at 264-65.[7]

This departure is significant in light of *Nacirema Operating Co. v. Johnson, supra,* where this Court rejected the suggestion that Congress intended the original Longshoremen's Act to extend to the limits of maritime contract jurisdiction:

> Respondents urge, however, that the 1927 Act, though it employs language that determines coverage by the "situs" of the injury, was nevertheless aimed at broader coverage: coverage of the "status" of the longshoreman employed in performing a maritime contract. We do not agree. *Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts.** But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in providing compensation was a narrower one.

* The admiralty jurisdiction in tort was traditionally "bounded by locality," *De Lovio v. Boit,* 7 F. Cas. 418, 444 (No. 3776) (C. C. D. Mass. 1815) (Story, J.) (followed in *Insurance Co. v. Dunham,* 11 Wall. 1 (1871)), encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction "extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea." *De Lovio v. Boit, supra,* at 444. *Since a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage for locality alone.* As the test indicates, however, the history of the Act shows that Congress did indeed do just that.

7. Each of the injuries in the claims before the Court occurred to an employee who satisfies the status test and who was employed at a situs covered by the Act. These jurisdictional facts are not in dispute here.

396 U. S. at 215-16 (emphasis supplied). By including the status test in 1972, Congress did not limit coverage under the amended Act to traditional notions of maritime tort jurisdiction. Rather, Congress incorporated concepts of jurisdiction over maritime contracts, which has never depended upon geographical limitations. Furthermore, the principles of uniformity and paramount congressional power in maritime tort law set forth in *Jensen* apply with equal force in maritime contract law; indeed, *Jensen* relied principally on contract cases in stating the principles. *E.g.*, *The Roanoke*, 189 U. S. 185 (1903). By defining the Act's coverage in terms of status, therefore, Congress strongly demonstrated its intent to vindicate the uniformity principle to its full extent.

Thus, the language enacted by Congress indicates its intent to exercise its paramount power to define the scope of the maritime law of the United States. Since it is the need for national uniformity in maritime matters expressed in the Constitution, as interpreted by cases such as *Jensen*, which forms the basis for this congressional power, the use of this language shows that Congress intended the Longshoremen's Act, as amended, to apply uniformly, and to the exclusion of state compensation laws, for all cases within its coverage.

The overall plan of the Longshoremen's Act further demonstrates that the remedy provided therein is intended to be comprehensive and exclusive. Section 3(a) of the Act states that "Compensation *shall be payable* under this Act" when the jurisdictional tests are met. 33 U. S. C. § 903(a) (emphasis supplied). Moreover, Section 4(a) declares that "Every employer *shall be liable for* and *shall secure* the payment to his employees of the compensation payable under sections 7, 8 and 9." 33 U. S. C. § 904(a) (emphasis supplied). This language is mandatory, and on its face permits no exceptions. An employer cannot discharge his obligations under the Act by concluding that an employee covered thereby can be compensated under state law. Nor can an employee or the authorities administering a state's compensation law withdraw an injury from the Act's coverage by invoking the state compensation remedy. It is inconceivable that the Congress which expanded federal coverage and made that coverage mandatory could have intended continued application of state compensation acts to undermine its efforts, yet that is exactly what the Commonwealth Court has attempted to do here.

Any notion that Congress could have intended this incongruous result is laid to rest by Section 5(a) of the Act, 33 U. S. C. § 905(a), which provides in pertinent part:

> *The liability of an employer* [to pay compensation under this Act] *shall be exclusive and in place of all other liability of such employer to the employee,* his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. (emphasis supplied)

This language does not support a construction limiting the remedy to *some* workers' compensation scheme, state or federal, or permitting election of a state or federal remedy, which then becomes the exclusive remedy in that particular case. To the contrary, upon securing the payment required by the Act, the employer's liability under the Act is the

only liability which exists. *See South Chicago Co. v. Bassett,* 309 U. S. 251, 256 (1940) ("For those employees who are entitled to compensation, the remedy under the Act is exclusive. § 5."). Congress' intent to preempt state law can hardly be more clearly expressed.

Claimants argue in their motion to dismiss or affirm that Section 5(a) cannot mean what it plainly says because that language was part of the Act prior to the amendments and was not held to preclude state compensation remedies in certain limited situations where the Act would have provided a remedy. (Motion of Appellees to Dismiss Appeal or to Affirm the Judgment Below, at 3-4). As discussed below at pp. 31-39, those decisions were the product of the confusion which had developed as a result of language in Section 3(a) of the original Act which was eliminated by the 1972 amendments and so cannot be relied upon to defeat Congress' purpose in amending the Act. More fundamentally, reliance upon pre-amendment cases to define the present meaning of Section 5(a) would violate basic canons of statutory construction.

When Congress amends an existing statute, the duty of the courts is to give the unchanged sections and the amendments a harmonious reading so that they do not conflict, even where that requires rejecting an earlier judicial interpretation of the unchanged language. *See Clark v. Uebersee Finanz-Korporation,* 332 U. S. 480 (1947); *Republic Steel Corp. v. Costle,* 581 F. 2d 1228 (6th Cir. 1978), *cert. denied,* 440 U. S. 909 (1979). In the case of the Longshoremen's Act, such harmony is only achieved by reading Section 5(a) literally, because that reading fully accords with Congress' intention to provide a uniform and mandatory federal compensation scheme for injured maritime workers. To hold that Congress anticipated continued application of a pre-1972 construction of the Act which implicitly modified the command of Section 5(a)

when the rationale for that construction was eliminated by the 1972 amendments "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation,* 332 U. S. at 489.

In short, careful analysis of the statutory language of the Longshoremen's Act, as amended, reveals that Congress was exercising its paramount power to define the maritime law of the United States as it affects injured maritime employees. Under the teaching of *Jensen* and *Moragne,* that law must operate uniformly throughout the United States, and the states are not free to undermine that uniformity when Congress has determined that the maritime law will apply. This principle of uniformity read in conjunction with the other language of the Act which makes the liabilities created thereunder mandatory and exclusive compel the conclusion that Congress has completely occupied the field of compensation for maritime workers for injuries within the Act's coverage, to the exclusion of state law.

IV. The Deletion of the Language in Section 3(a) of the Original Longshoremen's Act Which Limited Federal Coverage to Injuries for Which the States Could Not Validly Provide a Remedy Further Demonstrates Congress' Intent to Preempt State Law in 1972.

Congress' intent to preempt state compensation laws is also demonstrated by the language which it deleted from Section 3(a) when it amended the Longshoremen's Act. Prior to 1972, this section provided in pertinent part:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if re-*

covery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. (emphasis supplied)

In 1972 the italicized portion of this section was eliminated at the same time the definition of navigable waters was expanded. Congress thereby removed the only language which supported any argument that it had not exercised its full authority over maritime matters when the Act was originally enacted. Indeed, the meaning of the deleted proviso had troubled the courts for many years. *See Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 126 (1962). The importance of this deletion can best be understood by reviewing the development of the law of compensation for maritime workers from *Jensen* to the 1972 amendments.

A. Between the Time of *Jensen* and the Passage of the Original Longshoremen's Act, This Court's Decisions Created Uncertainty as to the Nature of Congress' Paramount Power to Define the Maritime Law and the Scope of the Principle of National Uniformity.

By the time *Jensen* was decided, workers' compensation statutes were generally recognized as an appropriate means of protecting workers from the losses caused by employment-related injuries. Since the effect of *Jensen* was to deprive a large body of maritime workers of this remedy, the decision was not met with favor, irrespective of the validity of its essential premise regarding the need for national uniformity in maritime matters. Congress quickly enacted a statute preserving state workers' compensation remedies to all maritime workers, including seamen. Act of October 6, 1917, ch. 97, 40 Stat. 395. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920),

the statute was declared an unconstitutional delegation of federal power to the states.

In 1922 Congress again attempted to fill this void, by amending the judicial code to preserve state compensation remedies for all maritime workers except seamen. Act of June 10, 1922, ch. 216, 42 Stat. 634.[8] Again, this Court declared the act unconstitutional in *Washington v. W. C. Dawson & Co.*, 264 U. S. 219 (1924):

> Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress. *Knickerbocker Ice Co. v. Stewart.* Exercising another power—to regulate commerce—Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act of April 22, 1908, c. 149, 35 Stat. 65) and thereby abrogated conflicting local rules. *New York Central R. R. Co. v. Winfield*, 244 U. S. 147.

264 U. S. at 227-28.

Congress responded to this suggestion in 1927 by enacting the original Longshoremen's and Harbor Workers'

8. The legislative history of the 1922 Act suggests that Congress perceived the need for uniformity in a way different from the *Jensen* court. H. R. Rep. No. 639, 67th Cong. 2d Sess. 1 (1922); *see Northeast Marine Terminal v. Caputo*, 432 U. S. 249, 257 n. 12 (1977). Congress sought uniformity for all maritime workers at a given port or shipyard, whether injuries occurred on land or over the water, while the *Jensen* court interpreted the Admiralty Clause as requiring national uniformity for all injuries within the maritime tort jurisdiction, which, at that time, was held to encompass only the navigable waters.

Compensation Act. Act of March 4, 1927, ch. 509, 44 Stat. 1424. In the ten years between *Jensen* and the Act's passage, however, the Court had already taken steps which, in the interest of providing a compensation remedy to injured maritime workers, had blurred the sharp line between the area of exclusive federal admiralty jurisdiction and the area where state law could constitutionally operate. It was this blurring which engendered years of difficulty in construing the scope of the Longshoremen's Act.

In *Grant Smith-Porter Ship Co. v. Rohde,* 257 U. S. 469 (1922), an employee of a shipbuilding company was injured while working on a partially completed vessel which was lying in the navigable waters at the company's yard. Recognizing that *Jensen* would appear to bring the case within the exclusive federal maritime jurisdiction, the Court nevertheless allowed recovery under a state compensation act because shipbuilding was a matter of local concern such that state regulation "would work no material prejudice to the general maritime law . . . ." 257 U. S. at 477.

Because of its importance in the development of jurisprudence under the Longshoremen's Act, the Court's reasoning in *Rohde* deserves special attention. By virtue of the Court's earlier decision in *Knickerbocker, supra,* 253 U. S. 149, no federal statute purporting to provide a compensation remedy for maritime workers existed at the time of *Rohde.* Nor did the general maritime law provide such a remedy. By contrast, the Court noted that "The injury [to Rohde] was suffered within a State whose *positive enactment* prescribed an exclusive remedy therefor." 257 U. S. at 476 (emphasis supplied). Moreover, both parties had contributed to the state's compensation fund and operated under its provisions.

This contrast prompted the Court to rely upon the holding in *Western Fuel Co. v. Garcia,* 257 U. S. 233 (1921), decided a few weeks before *Rohde,* wherein the Court concluded that the absence of a right of recovery for wrongful death under the general maritime law, *The Harrisburg,* 119 U. S. 199 (1886), allowed the application of state wrongful death statutes in an *in personam* admiralty action under a maritime but local analysis. The injury causing death in *Garcia,* however, occurred to a longshoreman unloading cargo located in the hold of a ship —the very type of accident involved in *Jensen.* The "local concern" allowed to defeat the uniformity of admiralty jurisdiction in *Garcia* was not related to the type of activity being performed (longshoring as opposed to shipbuilding) but rather to the state's express desire to provide a wrongful death recovery for deaths occurring within its territorial limits as opposed to the lack of a positive rule on the subject in the general maritime law.

Had a similar gloss been applied to *Rohde,* it, like *Garcia,* could have been read as permitting a state compensation remedy for all maritime workers injured in the territorial waters of the state until such time as Congress declared a uniform compensation remedy. The force of *Jensen* proved too strong, however, and, consequently, the maritime but local test in the compensation sphere became concerned solely with the nature of the work performed at the time of the injury. *See Baizley Iron Works v. Span,* 281 U. S. 222 (1930) (summarizing Supreme Court decisions after *Rohde* and distinguishing them on the basis of the nature of the work performed at the time of injury).

The confusion over the interface between state and federal maritime law over the navigable waters engendered by *Rohde* did not occur landward of the water's edge. In *State Industrial Commission v. Nordenholt Corp.,* 259 U. S. 263 (1922), the Court concluded that an injury to a mari-

time worker occurring on land, or an extension thereof, is covered by state law, relying upon the doctrine that the scope of maritime jurisdiction in tort depends solely upon locality. Thus, the Court chose not to adopt an exception to this doctrine for injuries on land (a "local but maritime" rule) as it had in *Rohde*, but the Court in *Nordenholt* recognized, at least implicitly, Congress' power to do so:

> The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land. In Jensen's case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antogonism exists. *There is no pertinent federal statute;* and application of the local law will not work material prejudice to any characteristic feature of the general maritime law.

259 U. S. at 276 (emphasis supplied).

B. The Limitation on Coverage in Section 3(a) of the Original Longshoremen's Act Reflects Both a Desire by Congress to Fill the Gap in Coverage Created by *Jensen* and a Concern on Congress' Part as to the Scope of Its Legislative Power in Admiralty.

With these decisions in mind, Congress enacted the Longshoremen's Act in 1927, which included the "if recovery . . . may not validly be provided by State law" limitation on coverage. On its face, this language would appear to indicate a congressional intent to provide a compensation remedy which only filled the gap in coverage created by *Jensen* as modified by *Rohde*, and, indeed, it was so interpreted for many years. *E.g., New Amsterdam Casualty Co. v. McManigal*, 87 F. 2d 332 (2d Cir. 1937).

The language could also be interpreted as reflecting Congress' apprehension that any attempt to exercise its admiralty power which covered those areas where state law could provide a remedy would be unconstitutional. In other words, Congress may have read *Rohde* and its progeny not only as defining the outer limits of the reach of state jurisdiction, but also the limits of federal maritime tort jurisdiction, such that the two were mutually exclusive.[9] While such trepidation on the part of Congress was probably unfounded, it was understandable given the strong voice with which this Court had spoken in admiralty cases since *Jensen* and its rejection of Congress' earlier attempts to provide a compensation remedy for maritime workers.

C. The Limitation on Coverage in the Original Longshoremen's Act, Which the Courts Construed as Embodying the "Maritime But Local" Exception to National Uniformity, Resulted in Confusion Over the Scope of the Act Which This Court Sought to Dispel by Later Decisions.

In early cases applying the Act, Section 3(a)'s limitation on coverage was viewed by some courts to express a congressional intent to incorporate the "maritime but local" exception as the test for federal coverage. *E.g., New Amsterdam Casualty Co. v. McManigal*, 87 F. 2d 332 (2d Cir. 1937); *see Crowell v. Benson*, 285 U. S. 22, 39-40 (1932). This created an insoluble jurisdictional

9. This interpretation is supported by the legislative history to the second aborted attempt by Congress to cover maritime workers discussed at p. 27, *supra*. The committee reports show that Congress would have preferred uniformity of coverage, albeit under state law, irrespective of whether an injury occurred on land or over the water. That Congress made no attempt to achieve this uniformity through a federal statute in 1927 suggests it may have felt the limits on its admiralty power prevented it from doing so.

dilemma due to the difficulty in determining whether an injury on the navigable waters fell within the "maritime but local" exception such that state law could apply, to the exclusion of the Longshoremen's Act. To alleviate this intolerable situation, this Court adopted the theory that, in marginal cases, presumptive weight would be given to the jurisdictional decisions of the appropriate state or federal authorities hearing the claim in the first instance. *Davis v. Washington Department of Labor and Industries,* 317 U. S. 249 (1942).

Thus developed the "twilight zone" doctrine which permitted the states to apply their compensation laws to claims falling close to the *Jensen* line but arguably on the side of the line where federal jurisdiction had previously been thought to be exclusive. This doctrine was rooted in the construction of the language of Section 3(a) as creating mutually exclusive state and federal compensation schemes, but it recognized that the difficulty in defining the precise line of demarcation demanded that some leeway exist to prevent a situation where no recovery, state or federal, was available.

Because even the "twilight zone" doctrine was insufficient to end the jurisdictional disputes created by the "if recovery . . . may not validly be provided by State law" limitation,[10] this Court reexamined prior interpretations in *Calbeck v. Travelers Insurance Co.,* 370 U. S. 114 (1962). In the two cases before the Court in *Calbeck,* maritime

10. After *Davis* many decisions from both federal and state courts continued to deny benefits on the basis that the claim had been brought under the wrong statute since jurisdiction was exclusive under the other act. *E.g., Noah v. Liberty Mutual Insurance Co.,* 267 F. 2d 218 (5th Cir. 1959); *Chappell v. C. D. Johnson Lumber Corp.,* 216 F. 2d 873 (9th Cir. 1954); *Ellis v. Travelers Insurance Co.,* 241 La. 433, 129 So. 2d 729 (1961); *Gaddies v. Trenton Marine Terminal, Inc.,* 86 N. J. Super. 125, 206 A. 2d 180 (1965); *Warner v. Travelers Insurance Co.,* 332 S. W. 2d 789 (Tex. Civ. App. 1960).

workers injured while engaged in shipbuilding activities on uncompleted vessels floating in the navigable waters were accorded benefits under the Longshoremen's Act by a deputy commissioner. These awards were overturned by the United States Court of Appeals for the Fifth Circuit because these claims plainly fell within the "maritime but local" exception. Indeed, they were factually indistinguishable from *Rohde* itself.

In reversing the court of appeals, this Court reviewed the legislative history of the 1927 Act and held:

> We conclude that Congress used the phrase "if recovery . . . may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which *Jensen, Knickerbocker* and *Dawson* had rendered questionable the availability of a state compensation remedy. Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

370 U. S. at 126-27 (footnotes omitted).

The key to the Court's holding is found in the following language, quoted with approval in *Calbeck,* from an earlier court of appeals decision, *DeBardeleben Coal Corp. v. Henderson,* 142 F. 2d 481, 483-84 (5th Cir. 1944):

> It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision "if recovery . . . may not validly be provided by State

> law" was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. . . . In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the "local concern" doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them.

370 U. S. at 130-131.

Thus, *Calbeck* adopted the interpretation that the limitation in Section 3(a) was inserted merely as an exercise of caution by Congress to insure that it did not exceed its legislative power in admiralty. Since, as *Calbeck* discussed, that power plainly extended to the water's edge, a remedy under the Act was always available for injuries occurring on the navigable waters irrespective of the power of the states under the "maritime but local" exception.

Calbeck was read as creating an area of concurrent jurisdiction where both state and federal law may operate. While this may have been the practical effect of the decision, the Court's reasoning certainly does not compel such a result. Indeed, had the *Calbeck* gloss of Section 3(a) been adopted shortly after the Act's passage, it is likely that federal and state jurisdiction would have been held to

meet, but not overlap, at the bright line of the water's edge. By 1962, however, the Court was apparently reluctant to overrule 35 years of precedent applying the "maritime but local" doctrine lest any further confusion be generated.

Given *Calbeck's* conclusion that Congress intended to exercise in full its admiralty jurisdiction over injuries occurring on the navigable waters, it is not surprising that maritime workers sought to push the scope of federal coverage beyond the water's edge to recover for land-based injuries, consistent with decisions in other cases where the Court had recognized a broadening of the geographical reach of the maritime law. *E.g., O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943). The United States Court of Appeals for the Fourth Circuit held such coverage existed for injuries to longshoremen on a dock, on the strength of *Calbeck*, in *Marine Stevedoring Corp. v. Oosting*, 398 F. 2d 900, 905 (4th Cir. 1968):

> [W]e need only repeat Judge Palmieri's observation in Michigan Mutual Liability Co. v. Arrien, 233 F. Supp. 496, 501 (S. D. N. Y. 1965), aff'd 344 F. 2d 640 (2 Cir. 1965), that "[w]hat is just as important as the actual holding in *Calbeck* is the general approach to the [Longshoremen's Compensation] Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an affirmative exercise of admiralty jurisdiction."
>
> This affirmative exercise of the admiralty power of Congress "to the fullest extent" of its jurisdiction, creating "a coverage co-extensive with the limits of its authority," can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority.

> Again, in the words of Judge Palmieri, "it thus appears that 'upon navigable waters' is to be equated with 'admiralty jurisdiction.'"

This Court was not prepared to go so far, however, and it reversed the court of appeals in *Nacirema Operating Co. v. Johnson*, 396 U. S. 212 (1969). While the *Nacirema* Court recognized Congress' power to cover maritime workers injured on land, it concluded that this power had not been exercised in 1927 when the Longshoremen's Act was passed.

D. In 1972 Congress Deleted the Limitation on Coverage in Section 3(a) and Thereby Created a Uniform and Exclusive Federal Compensation Remedy for Maritime Workers.

The Congress which passed the 1972 amendments to the Longshoremen's Act, unlike its counterpart in 1927, was not timid in the exercise of its legislative power in admiralty nor concerned merely with filling a gap in the coverage of state compensation statutes. It intended to enact a uniform compensation system for all maritime workers without reference to the competence of the states to provide a remedy for some of those workers. To make its intention crystal clear, it deleted that language from Section 3(a) which had created this impediment to uniform coverage for maritime workers seaward of the water's edge prior to 1972.

It has been suggested that this deletion was meaningless because *Calbeck* had effectively written this language out of the Act. This suggestion is without merit. In the first place, "It is an accepted canon of statutory construction that where Congress had advertently changed the legislative language the change must be given effect."

United States v. Guthrie, 387 F. 2d 569, 571 4th Cir. (1967). *Accord, Central Bank, N. A. v. Federal Home Loan Bank of San Francisco*, 430 F. Supp. 1080, 1085 (N. D. Cal. 1977). If *Calbeck* had truly nullified this language, the fact that Congress still felt it necessary to remove it speaks eloquently to Congress' intention to place the Longshoremen's Act on a wholly new footing removed from the "Serbonian bog"[11] into which the original Act had fallen.[12] Moreover, the deletion of the language comes in the context of amendments extending the coverage of the Act to land, where state compensation laws were valid and pervasive and where the force of *Calbeck's* rationale anchored to maritime tort jurisdiction would be uncertain. Thus, Congress could only be certain of the amended Act's exclusive application to land-based injuries, as well as those occurring over the navigable waters, if it eliminated the language suggesting the possibility that state law could provide a remedy to injured maritime workers as well. This deletion, when combined with the other affirmative statutory evidence of Congress' purpose to create a uniform federal remedy to the exclusion of the states, leads to the ineluctable conclusion that the 1972 amendments preempted state law.

The Commonwealth Court's holding that concurrent jurisdiction is appropriate under the amended Act because a concept of concurrent jurisdiction had developed in pre-1972 decisions such as *Calbeck* is also wholly unwar-

11. *Johnson v. Texas Employers Insurance Association*, 558 S. W. 2d 47, 54 (Tex. Civ. App. 1977) (Keith, J., dissenting).

12. To be sure, Congress was apparently gratified by *Calbeck's* recognition of the breadth of its legislative authority in maritime matters. However, *Calbeck*, to the extent it appeared to reserve the possibility that state law could also affect and limit a maritime worker's compensation under some theory of concurrent jurisdiction, did not nullify the proviso and stood in the way of Congress' goal of providing a comprehensive, uniform federal remedy.

ranted.[13] *Calbeck*, in combination with *Nacirema*, represented a practical attempt to rationalize the borderline between federal and state coverage at the water's edge and vindicate the *Jensen* uniformity principle. The necessity for attempting to effect this solution by judicial interpretation ended in 1972 when the language which had resulted in the adoption of the gerrymandered *Jensen* line of demarcation was deleted. Congress wiped the slate clean and replaced that undiscernible line with a precise definition of coverage based upon the status of the worker and the situs of the injury, wholly irrespective of the competence of the states to provide a remedy for any injury now covered. *See Weyerhaeuser Co. v. Gilmore*, 528 F. 2d 957, 960 (9th Cir.), *cert. denied*, 429 U. S. 868 (1976) ("[T]he 1972 Amendments to the pertinent sections of [the Longshoremen's Act] eliminate the gray areas of jurisdiction under the former statute and place a clear line of demarcation between those employees entitled to benefits of federal compensation and those entitled to recover under state law."). To be sure, there may be questions whether a particular claim near the edge of the expanded federal coverage falls under the Longshoremen's Act. But the possibility that such questions may be presented in other cases cannot defeat the exclusivity of the federal remedy under the Longshoremen's Act in the cases at bar.

13. Similar reasoning appears in those decisions from other state courts which have applied state compensation statutes to claims within the coverage of the Longshoremen's Act. *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche*, 434 U. S. 803 (1977); *Umbehagen v. Equitable Equipment Co.*, 329 So. 2d 245 (La. Cir. Ct. App.), *writ of review denied for lack of final judgment*, 333 So. 2d 241 (La. 1976); *Johnson v. Texas Employers Insurance Ass'n*, 558 S. W. 2d 47 (Tex. Civ. App. 1977). In any event, decisions interpreting the original Act cannot be relied upon to defeat Congress' manifest intention to establish a uniform federal compensation system for maritime employees.

In short, Congress has removed the language from Section 3 of the Act which caused the intolerable jurisdictional dilemma leading to the *Calbeck* decision. In so doing, it has also removed the fetters which had prevented, and might have continued to prevent, the full exercise of the presumption of the Act's coverage in Section 20(a), 33 U. S. C. § 920(a), and the judicial principle of bringing doubtful claims within the Act's expansive jurisdiction. *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, 268 (1977). The rationale for concurrent jurisdiction, therefore, no longer exists, and the pre-1972 decisions are not relevant to determining Congress' intent in enacting the 1972 amendments to the Longshoremen's Act.

V. The Legislative History of the 1972 Amendments to the Longshoremen's Act Plainly Evidences a Congressional Intent to Preempt State Law With a Uniform Federal Compensation Scheme for Maritime Workers.

Congress' intention to preempt state compensation statutes for injuries within the coverage of the amended Longshoremen's Act becomes even more plain when the legislative history of the 1972 amendments is examined. The reports of both Houses of Congress accompanying the legislation which became the 1972 amendments are identical in their discussion of the major provisions of the legislation. S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) (the "Senate Report"); H. R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) (the "House Report"). The Senate Report, however, begins with a summary of the legislation not found in the House Report:

> The principle [sic] purpose of S. 2318 is to amend the Longshoremen's and Harbor Workers' Compensation Act in order to upgrade the benefits, *extend cover-*

age to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms.

Senate Report at 1 (emphasis supplied). Thus, the expansion of coverage of the Act was one of the primary reasons for the passage of the amendments. The purposes of this expansion are set forth in the reports as follows:

EXTENSION OF COVERAGE TO SHORESIDE AREAS.

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. *The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.*

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages.

* * *

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. . . .

Senate Report at 12-13; House Report at 10-11, *reprinted in* [1972] U. S. CODE CONG. & AD. NEWS 4698, 4707-08 (emphasis supplied).

This quotation shows that two objectives were paramount in Congress' judgment: adequacy of benefits and uniformity of coverage. Congress recognized that, "if State laws are permitted to continue to apply to injuries occurring on land," while benefits under the Longshoremen's Act were increased, the results would be twofold: 1) a disparity of benefits among maritime workers depending upon the situs of injury; and 2) an almost certain inadequacy of benefits for workers covered by state law. Congress prevented these undesirable results by invoking its admiralty power to expand federal coverage and to exclude state law.

As the reports show, Congress was well aware that state law was applicable to injuries on land only because Congress "permitted" state law to operate despite the maritime nature of those injuries. In 1972 Congress withdrew that permission. The principles of *Jensen* were brought to bear in 1972 when Congress expressed its intent "to permit a *uniform* compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." [14] *Jensen* precluded application of state law at a time when neither Congress nor the general maritime law provided a compensation remedy for maritime workers. Its holding is even more applicable here where Congress has expressly announced both the substance and scope of the uniform maritime law.[15]

14. The Committees' choice of the word "permit" does not undercut the intention to enact a uniform and exclusive federal compensation system for maritime workers. In this context, the word relates to Congress' efforts to remove the impediments in the original Longshoremen's Act which precluded the uniformity sought. In so doing, Congress intended to allow the uniformity principle of *Jensen* to operate for all maritime workers.

15. The remaining legislative history of the 1972 amendments is fully consistent with the goals of adequacy and uniformity expressed in the Committee Reports. The reported debates on the floor of the House of Representatives contain comments by Repre-

As is shown by this legislative history, Congress made a judgment in 1972 as to the circumstances under which maritime workers are to recover compensation benefits and further determined what level of benefits is adequate. This judgment was based upon a full consideration and balancing of the particular needs of the longshoring and shipbuilding industries and the persons employed in those industries. The states simply are not free to second-guess Congress by applying compensation statutes which embody legislative judgments different from those of Congress.

VI. The Dominant Federal Interest in Providing a Uniform Compensation System for Maritime Workers, Coupled With the Complete Remedy Provided in the Longshoremen's Act, Fully Supports a Finding of Preemption.

As *Jensen* and its progeny amply demonstrate, the need for uniformity in maritime matters has resulted in a dominant federal interest in defining the substantive law which will apply to such matters. When this dominant federal interest is expressed in legislation such as the Longshoremen's Act, which not only defines the substantive maritime law but which also states the procedure for vindi-

15. (Cont'd.)
sentative Steiger of Wisconsin, a member of the House Committee which reported the bill, stating that the extension of coverage "is designed to correct [the] disparity" resulting from the limited coverage of the original Act. 118 Cong. Rec. 299 (1972). In the congressional hearings the testimony of representatives of labor and industry shows general support for the extension of coverage of the Act. *Hearings on S. 2318, S. 525 and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 73-74, 176-77 (1972) (statements of Howard McGuigan (AFL-CIO) and Ralph Hartman (Bethlehem Steel Corp.)); *Hearings on H. R. 247, H. R. 3505, H. R. 12006 and H. R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 297 (1972) (statement of Joseph Leonard (International Longshoremen's Ass'n)).

cation of the rights created, precisely defines the remedies available and provides a specialized tribunal vested with exclusive jurisdiction to hear claims thereunder, the states cannot interfere with the congressional scheme.

As this Court stated in *Hines v. Davidowitz*, 312 U. S. 52 (1941), discussing the area of foreign affairs which, like maritime matters, is imbued with a dominant federal interest:

> It cannot be doubted that both the state and the federal registration laws belong "to that class of laws which concern the exterior relation of this whole nation with other nations and governments." Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

312 U. S. at 66-67 (footnotes omitted).

Surely, Congress can elect to act in a limited fashion which allows continued state regulation when it exercises its legislative power in matters of a maritime nature, and this Court has recognized those limitations when they exist.[16] No such limitations are present in the Longshore-

16. *E.g., Askew v. American Waterways Operators*, 411 U. S. 325 (1973) (Water Quality Improvement Act did not preempt

men's Act, and it would be hard to imagine a more complete and pervasive scheme of regulation. Every facet of the relationship between an employer and employee once an employment-related injury occurs is spelled out in careful detail. For example, not only does Section 7 of the Act, 33 U. S. C. § 907, provide that the employer must furnish medical treatment to the injured employee, it also states the manner in which attending physicians are chosen and the extent to which the Department of Labor must supervise the treatment rendered. Similarly, Section 10, 33 U. S. C. § 910, precisely describes the method for calculating the claimant's average weekly wage, including alternative methods if those provided cannot reasonably and fairly be applied or if the claimant is a minor. Equally complete are the procedural provisions of the Act which state, *inter alia*, how and when notice of an injury is to be given (Section 12, 33 U. S. C. § 912), when claims must be filed (Section 13, 33 U. S. C. § 913), how claims are to be processed (Section 19, 33 U. S. C. § 919) and how administrative and judicial review of compensation orders may be obtained (Section 21, 33 U. S. C. § 921). The Longshoremen's Act "is virtually a cradle-to-grave act once an injury triggers its application." *Johnson v. Texas Employers Insurance Ass'n*, 558 S. W. 2d 47, 55 (Tex. Civ. App. 1977) (Keith, J., dissenting).

16. (Cont'd.)
state law regarding recovery of oil spill cleanup costs because federal act expressly allowed state regulation); *Kelly v. Washington*, 302 U. S. 1 (1937) (Motor Boat Act did not preempt state law providing for inspection and regulation of certain tug boats because those boats were not in the class of vessels covered by the Act); *cf. Rodrigue v. Aetna Casualty & Surety Co.*, 395 U. S. 352 (1969) (state law provided rule of decision in wrongful death action for deaths occurring on drilling rigs off Louisiana coast because Congress had expressly incorporated state law in Outer Continental Shelf Lands Act rather than adopting admiralty rules set forth in Death on the High Seas Act).

Despite the completeness of the remedy provided by the Longshoremen's Act, the Commonwealth Court concluded that state law is not preempted with respect to claims which fall within the Act's coverage because there may exist some other maritime worker not before the Court who would not be covered by the Longshoremen's Act. 41 Pa. Commw. at 308, 398 A. 2d at 1114 (J. S. App., pp. A6-A7). This reasoning is simply wrong. The fact that there is an outer limit to the coverage of the Longshoremen's Act is not and cannot be probative of Congress' intent to provide an exclusive federal remedy for claims of maritime employees to which the Act applies. The coverage limits are a recognition that Congress' constitutional power to define the maritime law is itself limited to maritime matters, but within that scope its power is paramount. *See O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 40-41 (1943).

The very nature of our constitutional system, granting express powers to the federal government and reserving the remaining powers to the states, necessarily results in situations where federal and state authority meet at some point. The fact that the dividing line may not always be precise does not detract from Congress' power to supersede state law when it determines a matter within its sphere should be subject to nationally uniform regulation.

An especially pertinent example of an exercise of congressional power to create an exclusive federal remedy for a limited class is the Federal Employers' Liability Act ("FELA"), Act of Apr. 22, 1908, ch. 149, 35 Stat. 65, 45 U. S. C. §§ 51-60. Prior to the enactment of the FELA, recovery for occupational injuries for all railroad workers was governed by state law. Exercising its power to regulate interstate commerce, however, Congress created a

federal compensation system which rendered common carriers liable for injuries caused to employees engaged in interstate commerce resulting from the negligence of the carrier or its officers, agents or employees. Thus, by definition, those railroad employees engaged solely in intrastate commerce are not covered by the FELA.

For many years the courts struggled with the difficulty in determining on which side of the line separating federal and state coverage a particular claim fell. *E.g., Erie R. R. Co. v. Collins,* 253 U. S. 77 (1920); *Shanks v. Delaware, Lackawanna & Western R. R. Co.,* 239 U. S. 556 (1916). Despite these problems of demarcation, it was never doubted that the FELA provided the exclusive remedy for injured railroad employees covered thereby. *New York Central R. R. Co. v. Winfield,* 244 U. S. 147 (1917); *Second Employers' Liability Cases,* 223 U. S. 1, 53-55 (1912).

Like the Longshoremen's Act, the FELA expressly makes the liability imposed thereunder mandatory. The FELA does not, however, contain language similar to that in Section 5 of the Longshoremen's Act which renders that liability exclusive of all others. Moreover, the FELA only imposes liability for negligence and does not expressly cover liability without fault, which is the typical liability imposed by workers' compensation statutes. Nevertheless, this Court held in *New York Central R. R. Co. v. Winfield,* 244 U. S. 147 (1917), that railroad employees could not elect the remedy otherwise available under state compensation statutes when the FELA applied, reasoning as follows:

> Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their em-

ployees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg v. Pennsylvania,* 16 Pet. 539, 617, "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

244 U. S. at 153-54. *Accord, Erie R. R. Co. v. Winfield,* 244 U. S. 170, 174 (1917) ("It is beyond the power of any State to interfere with the operation of [the FELA], either by putting the carriers and their employees to an election between its provisions and those of a state statute or by

imputing such an election to them by means of a statutory presumption.").

This reasoning applies with even greater force to the Longshoremen's Act which expressly provides that liability thereunder is exclusive and which affirmatively provides a federal liability not based upon concepts of fault or negligence. Because the FELA liability is based solely on the carrier's negligence, it was argued that a state still has an independent interest in protecting its workers with an additional no fault remedy. That interest, which was held insufficient to override the congressional purpose in *Winfield,* does not even come into play here because it is already fully satisfied by the Longshoremen's Act.

Thus, the only state interest which is arguably served by allowing state law to apply to claims covered by the Act is the interest in having compensation claims processed under the particular substantive and procedural provisions of the state law. This is precisely the kind of parochial interest which must yield to the dominant federal interest in providing a uniform federal remedy for all maritime workers. Congress has determined how best to compensate maritime workers for work-related injuries, and it is no longer open to the states to decide that the federal system is inadequate or otherwise inappropriate, or to supplant that system with its own compensation statute, under the guise of complementing the federal scheme.

VII. The Application of State Law to Claims Within the Coverage of the Longshoremen's Act Directly Conflicts With the Act.

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray v. Atlantic Richfield Co.,* 435 U. S. 151, 158 (1978). The decisions from the state courts holding jurisdiction

under state compensation statutes to be concurrent with that under the Longshoremen's Act have either rejected this principle entirely, *Poche v. Avondale Shipyards, Inc.* (*"Poche"*), 339 So. 2d 1212, 1215 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche,* 434 U. S. 803 (1977), or simply ignored it. *Sun Shipbuilding & Dry Dock Co. v. Workmen's Compensation Appeal Board,* 41 Pa. Commw. 302, 398 A. 2d 1111 (1979) (J. S. App., pp. A1-A10); *Johnson v. Texas Employers Insurance Ass'n.* (*"Johnson"*), 558 S. W. 2d 47 (Tex. Civ. Ct. App. 1977); *Murray v. City of Augusta,* 394 A. 2d 1171 (Me. 1978).[17] Both the Longshoremen's Act and the various state statutes create complete remedial systems, however, and conflict necessarily arises at virtually every level because the rights granted and responsibilities imposed are different.

It may be argued that the conflict between the Act and a state compensation statute ends at the time the claimant elects which remedy he will pursue. Such an argument ignores the fact that differing obligations are imposed upon employers under the Longshoremen's Act and the Pennsylvania Act (along with most other state acts) prior to the time any such election is made, and substantial penalties may occur if these obligations are not met.[18]

17. The Louisiana Circuit Court of Appeals did recognize the possibility of a conflict in *Umbehagen v. Equitable Equipment Co.* (*"Umbehagen"*), 329 So. 2d 245, 251, *writ of review denied for lack of final judgment,* 333 So. 2d 241 (La. 1976), but concluded there is not "such a conflict between the federal and state acts that the two acts cannot consistently stand together." Of course, the *Poche* decision by the Louisiana Supreme Court, which rejects the principle of *Ray* entirely, is the ultimate word from the Louisiana courts.

18. *Compare* Longshoremen's Act § 30, 33 U. S. C. § 930 (requiring the filing of a report of injury with the Department of Labor and imposing a civil penalty of $500.00 for failure to file), *with* Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 994 and § 991(d) (Purdon Supp. 1979-80) (requiring a report of injury to be filed

Conflicts also arise when an employer determines to pay compensation without an award. Under both the Longshoremen's Act and the Pennsylvania Act, the basic amount of compensation payable is 66 and ⅔ percent of the employee's pre-injury weekly wages. The methods for determining weekly wages and the maximum weekly amounts payable are entirely different under the two statutes, however. *Compare* Longshoremen's Act § 10, 33 U. S. C. § 910, *with* Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 582 (Purdon Supp. 1979-80). To further complicate matters, the number of weeks of benefits payable for scheduled disabilities differs substantially. *Compare* Longshoremen's Act § 8(c), 33 U. S. C. § 908(c), *with* Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 513 (Purdon Supp. 1979-80). How is an employer to determine what amount should be paid each week or for how many weeks that amount should be paid? Claimants would no doubt argue that the employer should apply the system which results in the greatest recovery, while employers would be expected to favor the system which provides the least. The command of the Supremacy Clause prohibits such a result, however. *See P. C. Pfeiffer Co. v. Ford,* 100 S. Ct. 328, 338 (1979) ("Congress did not intend the Act's coverage to shift with the employer's whim.").

At almost every point where the Longshoremen's Act and the Pennsylvania Act speak to a particular issue, be it substantive, procedural or remedial, some type of conflict surfaces. Until such time as the claimant makes

18. (Cont'd.)
with the Pennsylvania Department of Labor within three days of the date of injury and allowing imposition of a penalty not exceeding ten percent of the amount of benefits for failure to file). *See generally* Note, *Journey Into the Twilight Zone,* 23 LOYOLA L. REV. 504, 517-18 (1977) (arguing for exclusive federal jurisdiction on the ground that the Act's regulatory plan conflicts with the Louisiana regulatory plan).

the election which the court below says he is entitled to make, those conflicts must be resolved in favor of the provisions of the Longshoremen's Act.[19] Yet the claimant can completely reverse the process by electing state coverage with all of its own peculiarities and limitations, possibly subjecting the employer to penalties.

The Texas court in *Johnson* justified this anomalous result by suggesting that state law merely supplements the remedy provided by the Longshoremen's Act rather than conflicting with it. 558 S. W. 2d at 51. As a practical matter, such supplementation is a total displacement of federal law. The election to proceed under state law results in an adjudication by the state tribunal charged with the administration of that law, which is bound to follow the procedures specified in the state statute from which it derives its authority to hear compensation claims. Moreover, it is unlikely that such a tribunal could or would apply the substantive provisions of the Longshoremen's Act, supplementing its provisions with those of state law when this would benefit the claimant. Such a result was expressly foreclosed by the Louisiana Supreme Court in *Poche,* where it concluded that an election under state law requires that the whole body of state law be applied to the exclusion of the Longshoremen's Act even when the two laws are in direct conflict. 339 So. 2d at 1221.

Indeed, the *Poche* court recognized that the only reason a claimant would make such an election would be to avail himself of the substantive differences between state and federal law:

> That the provisions of the state and federal compensation laws with respect to third party negligence

19. This result is compelled by the Supremacy Clause, unless the employer also has a right of election, but none of the state cases have gone this far. *But see* Justice Keith's dissent in *Johnson,* 558 S. W. 2d at 55, suggesting that an employer must also have a right of election if jurisdiction is truly concurrent.

> actions are different cannot be disputed. We are of the opinion, however, that once the initial determination was made that the LHCA and state compensations statutes could operate concurrently, the appeal court was in error to reexamine the question of state-federal conflict with respect to particular provisions of the acts. It is obvious that unless the state statute provides benefits or rights beyond those accorded by federal law, there would be no reason to elect to pursue the state remedy. To hold, as did the appellate court, that a plaintiff may elect state law but only insofar as the rights accorded thereunder do not exceed those provided in the federal scheme is to render meaningless the right to make the initial election.

339 So. 2d at 1221. Thus, the very conflict which precludes the operation of state law under the Supremacy Clause is advanced as a justification for concurrent jurisdiction.

A slightly different explanation of the supplementary nature of state law is found in *Umbehagen* where the court concluded that "Achievement of [Congress'] purpose [in enacting the 1972 amendments], however, does not require exclusion of state power to provide a *more favorable remedy.*" 329 So. 2d 249 (emphasis supplied). If this statement means that state law does not conflict with the Longshoremen's Act, and therefore may be constitutionally applied, only when it is more favorable to the claimant, the result would be a jurisdictional dilemma far worse than that which existed during the early years of the original Longshoremen's Act.

Under the *Umbehagen* rationale, a state could assert jurisdiction under its compensation statute only after it

concluded that the state system would be more favorable to the claimant. Establishing this fact would require examination not only of the benefit levels under the competing systems, but also of the full range of substantive and procedural provisions to insure that a higher benefit level under state law (if it exists) is not rendered unavailable by some other provision which constrains the right to recover those benefits.

The impracticality of such an analysis is demonstrated by the cases now before the Court. Under Section 8(c)(20) of the Longshoremen's Act, 33 U. S. C. § 908(c)(20), compensation for facial disfigurement is limited to $3,500 while the Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 513 (Purdon Supp. 1979-80), permits recovery for disfigurement of 66 and ⅔ percent of wages for up to 275 weeks. This potential for a greater dollar recovery must be weighed, however, against the fact that the standards for establishing a compensable disfigurement under the Pennsylvania Act are more stringent than those under the Longshoremen's Act.

Compensation under the Longshoremen's Act is available for "serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment." 33 U. S. C. § 908(c)(20). The Benefits Review Board has read the two clauses of this subsection disjunctively so that disfigurement of the face, head or neck is compensable when found to be "serious" irrespective of any other consideration. *Brysiak v. Sun Shipbuilding & Dry Dock Co.*, 2 BRBS 197 (1975).

In sharp contrast to this single standard of compensability under the Longshoremen's Act, the Pennsylvania Act states four requirements which must be met before compensation is awarded. The disfigurement must

be: (1) serious; (2) permanent; (3) of such a character as to produce an unsightly appearance; and (4) such as is not usually incident to the employment. Pa. Stat. Ann. tit. 77, § 513(22) (Purdon Supp. 1979-80); *Workmen's Compensation Appeal Board v. Fruehauf Corp.*, 23 Pa. Commw. 466, 353 A. 2d 63 (1976). Thus, it is far from clear that the Pennsylvania Act is in fact more favorable to a worker suffering a disfigurement of the head, face or neck, and it provides no remedy for a disfigurement of other normally exposed areas of the body.[20]

Beyond the practical and undesirable difficulties of engaging in such an analysis every time a claim is filed, this result plainly contravenes the Supremacy Clause. As this Court held in *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 236 (1947), when Congress regulates a subject within its constitutional powers, "The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Accord, New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 152 (1917). When Congress passed the 1972 amendments to the Longshoremen's Act, it expressed its judgment as to the appropriate system for compensating maritime workers for disfigurement as well as other occupational injuries. If a

20. None of the claimants here were awarded benefits at or near the $3500 limit on disfigurement awards under the Longshoremen's Act, 33 U. S. C. § 908(c)(20). The referee awarded $570.00 to April, $530.00 to Januzciewicz, $1,140.00 to Kimmel, and $800.00 to Moore. (J. S. App., pp. A57, A64, A68, A72). The Workmen's Compensation Appeal Board, upon reversing the dismissal of Fields' claim by the referee, awarded him $1,500. (J. S. App., p. A32). In each case the referee or the Board approved counsel fees equal to 20% of the compensation award to the claimant's attorney payable out of the compensation awarded. (J. S. App., pp. A32, A57, A64, A68, A72). Under Section 28(a) of the Longshoremen's Act, any attorney's fee approved is payable by the employer separately and not charged against the award. 33 U. S. C. § 928(a).

conflicting state law system, be it more or less favorable, is allowed to operate concurrently, that law will necessarily "[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978), *quoting Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).

The obstacle to the accomplishment of Congress' purpose which concurrent jurisdiction creates has already manifested itself in cases subsequent to the 1972 amendments where claimants have initially chosen their state remedies and then sought recovery under the Longshoremen's Act. *Newport News Shipbuilding & Dry Dock Co. v. Director*, 583 F. 2d 1273 (4th Cir. 1978), *cert. denied*, 440 U. S. 915 (1979), *aff'g Jenkins v. Newport News Shipbuilding & Dry Dock Co.*, 6 BRBS 133 (1977); *Landry v. Carlson Mooring Service*, 9 BRBS 518 (1978), *appeal pending*, Nos. 79-1274, 79-1479 (5th Cir.). *See Pettus v. American Airlines, Inc.*, 587 F. 2d 627 (4th Cir. 1978), *vacating* 6 BRBS 461 (1977) (involving the District of Columbia Workmen's Compensation Act, which incorporates the substantive provisions of the Longshoremen's Act). Each of these cases recognizes that the pursuit of a claim under the Longshoremen's Act after some type of state proceedings have occurred presents thorny issues of *res judicata*, collateral estoppel, election of remedies and full faith and credit. The various opinions, however, present a bewildering array of approaches to solving these issues which points to a dilemma no less complex or insoluble than that which developed in the area of coverage under the original Longshoremen's Act.

In *Landry*, a majority of the Benefits Review Board reluctantly concluded that application of principles of *res judicata* and election of remedies to the facts before it precluded a claimant who had recovered $20,000 in settlement of a claim under the Texas compensation statute from

claiming under the Longshoremen's Act, where his benefits might have exceeded $250,000. As Boardmember Miller stated in his vigorous dissent, "The practical effect of today's ruling is to hold that a judgment in Texas can nullify a Federal statute which Congress passed for Claimant's protection." 9 BRBS at 528.4. The dissent further recognized that the majority's result is avoided when full effect is given to the congressional intent to supersede state law by enacting the 1972 amendments to the Act:

> Is the Longshoremen's and Harborworkers' Compensation Act the exclusive remedy for an injury sustained by a maritime employee working upon the navigable waters? If so, then not only must the state rule of *res judicata* yield to the superior interest of the federal government, but any action by the state on a maritime employee's compensation claim is void as beyond the state's constitutionally-restricted jurisdiction.
>
> * * *
>
> In light of these changes [the 1972 amendments] and the legislative history, I conclude that the Congress, through the 1972 Amendments, moved the *Jensen* line landward to cover maritime employees injured on what was formerly land-based areas. *Nacirema Operating Co. v. Johnson, supra. See also Victory Carriers Inc. v. Law*, 404 U. S. 202, 216 (1971).
>
> Therefore, claimant in the present case cannot have his federal remedy barred by any state proceeding since he clearly is covered by the Federal Act. State law must "yield to the needs of a uniform federal maritime system." *Thibodaux* [*v. Atlantic Richfield Co.*, 580 F. 2d 841, 847 (5th Cir. 1978)].

9 BRBS at 528.5, 528.7.

As long as the states are permitted to exercise a jurisdiction over the claims of some maritime workers concurrent with that under the Longshoremen's Act, results such as that achieved in *Landry* which defeat Congress' purpose to provide an adequate and uniform compensation system appear inevitable. Therefore, the Supremacy Clause demands that the remedy provided by the Longshoremen's Act be exclusive for claims such as these which fall within the Act's coverage.

CONCLUSION.

For the foregoing reasons, the judgment of the Commonwealth Court of Pennsylvania affirming the award of benefits to the five individual appellees should be reversed, and the cause remanded with instructions to dismiss the claims under the Pennsylvania Workmen's Compensation Act for lack of jurisdiction.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-343

SUN SHIP, INC.

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH KIMMEL and WILLIE MOORE.

Appellees

BRIEF FOR THE APPELLEES

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

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SUN SHIP, *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH KIMMEL and WILLIE MOORE, *Appellees*

BRIEF FOR APPELLEES

On Appeal From the Commonwealth Court of Pennsylvania

OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania (J.S. App. pp. A1-A10) is officially reported at 41 Pa. Commw. 302 and unofficially reported at 398 A.2d 1111. The opinions of the Pennsylvania Workmen's Compensation Appeal Board (J.S. App., pp. A18-A53) and the referees' decisions (J.S. App., pp. A54-A72) are not reported.

JURISDICTION

The order of the Commonwealth Court of Pennsylvania was entered on March 16, 1979. (J.S. App., pp. A8-A10). Appellant Sun Ship, Inc., filed petitions for

allowance of appeal from this order with the Pennsylvania Supreme Court which were denied by that court on June 4, 1979. (J.S. App., pp. A11-A15). On July 19, 1979, Sun Ship, Inc., docketed a notice of appeal to this Court with the Commonwealth Court (J.S. App., pp. A16-A17) and filed its Jurisdictional Statement on August 31, 1979. Probable jurisdiction was noted on January 7, 1980.

The jurisdiction of this Court rests upon 28 U.S.C. §1257(2) because this appeal draws in question the validity of the application of the Pennsylvania Workmen's Compensation Act as being repugnant to the Constitution and laws of the United States and a decision of the Commonwealth Court is in favor of the validity of the application of the state statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Art. III, §2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. United States Constitution, Art. VI, cl. 2:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof;

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 2(3), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U.S.C. §902(3).

When used in this chapter —

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

4. Section 3, Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576,86 Stat. 1251, 33 U.S.C. §903:

COVERAGE

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). No compensation shall be payable in respect of the disability or death of --

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

5. Section 5(a), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U.S.C. §905(a):

EXCLUSIVENESS OF LIABILITY

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

6. Section 101, Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, Pub. L. 736, No. 338, *as amended,* Pa. Stat. Ann. tit. 77, §1 (Purdon):

SHORT TITLE; APPLICATION OF ACT

That this act shall be called and cited as The Pennsylvania Workmen's Compensation Act, and shall apply to all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extra-territorially as provided by section 305.2

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether Congress, by its 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), preempted state jurisdiction under a state statute such as the Pennsylvania Workmen's Compensation Act (PWCA), with respect to claims falling within the coverage of the LHWCA and state law.

COUNTER-STATEMENT OF THE CASE

Claimant-Appellees were injured during the period from 1973 through 1975 in the course of their employment with appellant Sun Ship, Inc. Each claimant sustained a facial disfigurement, which is compensable under the Longshoremen's and Harbor Workers' Compensation Act[1], 33 U.S.C. §908(c)(20), and under the Pennsylvania Workmen's Compensation Act[2], Pa. Stat. Ann. tit. 77, §513(c)(22). While the maximum award for that type of injury under the LHWCA is $3,500, the Pennsylvania Act permits payment of an amount up to $66,825 (275 weeks at $243 per week) in compensation for serious and permanent disfigurement. Moreover, contested disfigurement claims under the LHWCA may take up to 18 months to process, while a state claim may be adjudicated in six to eight weeks. Therefore, an injured claimant may be substantially advantaged by proceeding under state law in situations involving facial disfigurement.

Each claimant sought compensation under the Pennsylvania Workmen's Compensation Act. Their claims were sustained by the Pennsylvania Workmen's Compensation Appeal Board, which rejected Appellant's contention "that jurisdiction under the Pennsylvania Workmen's Compensation Act . . . ha[d] been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers' Compensation Act. . . ." Jurisdictional Statement, p.A.19. The Commonwealth Court of Pennsylvania sustained the Board's jurisdictional ruling, and the Pennsylvania Supreme Court denied Appellant's petitions for allowance of appeal. Sun Ship thereafter filed its appeal in this Court. Jurisdictional Statement, pp. A16-A17.

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1. Act of March 4, 1927 ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U.S.C. §901 *et seq.*

2. Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*, Pa. Stat. Ann. tit. 77, §1 *et seq.* (Purdon).

SUMMARY OF THE ARGUMENT

There has been no preemption of the exercise of state jurisdiction pursuant to the PWCA by the passage of the 1972 amendments to the LHWCA to claims of injured maritime workers falling within the coverage of both Acts. At issue is whether an injured worker who suffers a work-related injury which would be compensable under either the PWCA or the LHWCA may elect which remedy to pursue, if there is concurrent jurisdiction.

The claimants in the case at bar suffered serious and permanent facial disfigurements. A claimant under the PWCA may receive up to 275 weeks of compensation for disfigurement. The maximum allowable rate per week under the PWCA is $243. Contested claims for disfigurement under the PWCA usually take six to eight weeks for adjudication.

The LHWCA permits a maximum award for facial disfigurement of $3,500. Adjudication of the case before an Administrative Law Judge takes approximately eighteen months. There are clear advantages for claimants with facial disfigurements to proceed under the PWCA as opposed to the LHWCA.

The Commonwealth Court of Pennsylvania correctly applied the legal precepts of this Court concerning preemption and concurrent jurisdiction.[3] The principle of concurrent jurisdiction between the state act and the LHWCA was clearly sanctioned and articulated by this Honorable Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). This Honorable Court held that the uniform application of the LHWCA does not require maritime employees to give up those rights to more favorable compensation payable under state acts. This Honorable Court has recognized the existence of con-

3. *Rice v. Santa Fe Elevator Corp.*, 33 U.S. 218, 230 (1947); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962).

current jurisdiction of state remedies in certain areas which were seaward of the "line" delineated in *Southern Pacific Co., v. Jensen*, 244 U.S. 215 (1917). A correct application of the holding in *Calbeck v. Travelers Insurance Co., supra*, negates the concept that the *Jensen* "line" should advance or recede because this Honorable Court had permitted state remedies in areas seaward of that "line".

Appellants urge that *Calbeck* was negated by the 1972 amendments to the LHWCA. Appellant is confusing uniformity with exclusivity. The 1972 amendments did not change the law as established in *Calbeck*. This is not the first time that an employer has raised this argument. Each time this argument has been made by an employer in the courts it has been decided against the employer. Other courts in other jurisdictions have decided this issue and have held that concurrent jurisdiction exists.[4]

In *Murray v. City of Augusta*, 394 A.2d 1171, 1173 (Me. 1978), Justice Archibald, for the Supreme Court of Maine, wrote:

> In 1972 the LHWCA was amended to extend its jurisdiction to include persons engaged in maritime employment "including a ship repairman, shipbuilder and shipbreaker." 33 U.S.C.A. §902(3). We will not presume a preemption by the federal government since the amendments to LHWCA does [sic] not contain such definitive language that we can infer a congressional attempt to preempt ju-

4. *Umbehagen v.Equitable Equipment Co.*, 329 So. 2d 245 (La. Cir. Ct. App.), *writ of review denied for lack of final judgment*, 333 So. 2d 241 (La. 1976); *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche*, 343 U.S. 803 (1977); *Johnson v. Texas Employers Insurance Ass'n*, 558 S.W.2d 47 (Tex. Civ. App. 1977); *Murray v. City of Augusta*, 394 A.2d 1171 (Me. 1978); *Newport News Shipbuilding & Dry Dock Co. v. Director*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979).

risdiction over all injuries occurring in the covered areas. *Johnson v. Texas Employers Insurance Association*, Tex. Civ. App., 558 S.W.2d 47, 50-52 (1977). The Act contains no language that demonstrates (1) it was the clear and manifest purpose of Congress to preempt the field, or (2) that the exercise of dual authority is repugnant to the congressional objective. *Poche v. Avondale Shipyards, Inc.*, La., 339 So.2d 1212, 1218 (1973). 394 A.2d at 1173.

The leading commentators and authorities in this field who have dealt with the question of whether there is concurrent jurisdiction after the promulgation of the 1972 amendments have decided that there is concurrent jurisdiction and no preemption.[5]

The 1972 amendments to the LHWCA do not erase coverage of the PWCA to injuries normally covered. Absent federal preemption and any fatal conflicts between the statutory schemes, a state may constitutionally exercise its police powers respecting maritime activities concurrently with federal jurisdiction. *Askew v. American Waterways Operators*, 411 U.S. 325 (1973).

> While Congress has extended the Admiralty jurisdiction beyond the boundaries contemplated by the framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. . . .
>
> Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law. 411 U.S. at 341.

5. G. Gilmore and C. Black, *The Law of Admiralty* 425-426 (2d ed. 1975); 4 Larson, *The Law of Workmen's Compensation* §89.70 (1978); Larson, *The Conflicts Problem Between The Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments*, 14 HOUSTON L. REV. 287 (1977); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 694-95 (1973).

ARGUMENT FOR APPELLEES

I. The Conclusion of the Commonwealth Court of Pennsylvania That Pennsylvania May Constitutionally Apply Its Workers' Compensation Law to Grant Relief to Shipyard Workers Is Clearly in Accordance with the Law of This Court As Well As the Intent of Congress in Promulgating the 1972 Amendments.

It is the stated policy of this Honorable Court to show respect for the rightful independence of the states within the Federal system. Effectuation of this policy dictates the construction of Federal statutes in such a way as to preserve the authority of the states to regulate conduct within their borders affecting their citizens, notwithstanding Federal regulation of the same conduct. This policy has prevailed in particular where the conduct had traditionally been subject to state law before Federal authority was extended over it.

At the same time, this Court has recognized that workers' compensation legislation is enacted primarily for the benefit of injured workers and their families, and "should not [be] readily interpret[ed]. . . so as to cut off an employee's right to sue under other legislation passed for his benefit." *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622, 628 (1947).

Although we must be mindful of the unyielding nature of the Supremacy Clause, once the circumstances necessary to its invocation are found, Federal laws are construed so as to leave room alongside them for the operation of state laws, unless a contrary congressional intention is manifest.[6]

6. *DeCanas v. Bica*, 424 U.S. 351, 356-63 (1976); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Kesler v. Department of Public Safety*, 369 U.S. 153, 166-74 (1962); *Kake Village v. Egan*, 369 U.S. 60, 63-64 (1962); *cf. Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Davis v. Washington Department of Labor & Industries*, 317 U.S. 244 (1942).

After considering the argument that federal remedies should be provided for maritime employees' injuries on land, because state remedies were generally inadequate, this Court pointed out that legislative action was called for and not judicial action. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1972), *reh. denied*, 404 U.S. 1064 (1972). Congress, in 1972, without extending the boundaries of the general applicability of maritime tort law, or the admiralty jurisdiction of the Federal Courts, provided a stop-gap federal workers' compensation remedy.

The LHWCA, even with its amendments, is not a pervasive and comprehensive plan of federal regulation. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). It does not provide anything approaching a comprehensive scheme of rights and liabilities to replace the diverse state laws applicable to injuries covered. Exclusive federal jurisdiction was not provided in recognition of the inadequacy of the LHWCA to supplant state remedies. The concerns of federalism and the inadequacy of the LHWCA to replace existing state remedies with a comprehensive statutory scheme requires that the disruption of the application of state law to injuries outside the general application of Federal maritime law be kept to a minimum.

II. The Supremacy Clause of the Constitution Precludes the States from Enforcing Its Legislation When Congress Has Preempted the Field.

The parties are in agreement that the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, permits Congress to preempt a field with a uniform, comprehensive statutory scheme which is national in scope.

Congressional purpose to preempt state regulation in a particular area is established where (1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congres left no room for the states to supplement it; (2) the federal statute touches a

field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; or (3) a purpose to exclude state control is revealed by the object sought to be obtained by the federal law and the character of obligations imposed by it. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

No congressional purpose to preclude state regulation in this particular area can be read from the 1972 amendments to the LHWCA. Although the appellees agree that Congress can preempt a field, they disagree with the later contention of Appellant that Congress, by the passage of the 1972 amendments to the LHWCA, preempted state regulation in providing compensation to injured workers.

III. The Basic Nature of Maritime Law Does Not Require National Uniformity Moreso Than Any Other Field of Law.

Appellant argues that there is something "unique" about maritime law which demands that there be national uniformity. Brief for Appellant at 15. Appellant implies, citing *Southern Pacific Co. v. Jensen*, 244 U.S. 215 (1917), that the "unique" nature of maritime law requires exclusive federal jurisdiction over this entire body of law. This Honorable Court, however, has settled this issue in *Calbeck v. Travelers Insurance Co., supra,* by ruling that there was concurrent and not exclusive jurisdiction.

IV. The Language of the 1972 Amendments to the LHWCA Shows No Intention to Establish an Exclusive System of Compensation for Maritime Workers.

The wording of the 1972 amendments, appellant argues, establishes a uniform and exclusive system of compensation for maritime workers. Brief for Appellant

at 19. This Court's prior cases indicate, however, that when a state's exercise of its police power is challenged under the Supremacy Clause, the Court starts with the assumption that the historic police powers of the States are not to be superseded by a Federal act unless that was the "clear and manifest purpose of the Congress." *Rice v. Santa Fe Elevator Corp., supra* at 230.

There was no "clear and manifest purpose of Congress" to preempt state regulation in the 1972 amendments to the LHWCA. There was nothing in those amendments which purported to change state jurisdiction over maritime workers' injuries. In order to flesh out some form of argument from the language of the 1972 amendments, Appellant has had to argue from definitions, minor language changes, and the like. But the substance of their position never materializes because the necessary ingredient is absent: no clear Congressional intent is present. Professor Larson summarized this Court's approach to appellant's argument by stating: "Especially when Congress has moved into an area formerly occupied by State Legislation, preemption would not be presumed."[7] This well-established principle that preemption will not be presumed was perhaps best stated in the leading case of *Rice v. Santa Fe Elevator Corp., supra:*

> Congress legislated here in a field which the States have traditionally occupied. [Cites omitted]. So we start with the assumption that the historic police powers of the States were not be to superseded by the Federal Act unless that was the clear and manifest purpose of Congress. 331 U.S. at 230.

In view of the fact that since 1922 this Court has permitted maritime workers to recover under state workmen's compensation statutes, any change in that law by

7. 4 Larson, *The Law of Workmen's Compensation* §89.70 at 16-285 (1978); See, also, *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1928); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1941).

Congress must be clear, unequivocal, and not open to interpretation. *See Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

At the time of the 1972 amendments, we had had an uninterrupted period of a half century in which state workmen's compensation statutes were held applicable to injuries suffered by maritime workers. In view of this, it is certainly elementary that if Congress wanted to eliminate the jurisdiction of such tribunals it would have done so clearly, concisely, and in language that was beyond any doubt. It is inconceivable that Congress would obfuscate its intention to radically change and eliminate concurrent state jurisdiction which had existed for fifty years.

Appellant cites Section 5(a) of the LHWCA, 33 U.S.C. §905(a) to bolster its argument that the "exclusivity" language bars any claim under state workers' compensation acts:

> *The liability of an employer* [to pay compensation under this Act] *shall be exclusive and in place of all other liabililty of such employer to the employee . . .* Brief for Appellant at 23.

This exact language appeared in the original Act as enacted on March 4, 1927.[8] It prohibits an injured employee from bringing a Common Law action against his employer for negligence.[9] Section 5(a) is simply irrelevant to thie issue under discussion. As this Court said in *Davis v. Washington Department of Labor & Industries*, 317 U.S. 249, 256 (1942):

> Nor can we gain any assistance in this circumstance from the clause in the federal act which

8. Act of March 4, 1927 ch. 509, 44 Stat. 1424.

9. *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973); *Keller v. Dravo Corp.*, 441 F.2d 1230 (5th Cir. 1971); *Hughes v. Chitty*, 283 F. Supp. 734 (E.D. La. 1968), *aff'd*, 415 F.2d 1150 (5th Cir. 1969); *Bynum v. The S.S. Mormacteal*, 188 F. Supp. 763 (E.D. Pa. 1960).

makes that act exclusive. 33 U.S.C. §905. That section gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line, and is no assistance in discovering on which side he can properly be placed.

V. There Is No Significance to the Deletion in 1972 of the Language in Section 3(a) Relating to Recovery Provided by State Law.

Prior to 1972, Section 3(a) of the Longshoremen's Act provided in part as follows:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* (Italics supplied).

In the 1972 version of LHWCA, the above italicized portion of the section was omitted. Appellant would ascribe meaning and significance to the elimination of this language. This deletion, however, had no significance whatsoever in view of the law as it existed in 1972.

Indeed, the argument should be made that the elimination of the phrase "and if recovery for the disability or death through workmen's compensation proceeding may not validly be provided by State law" simply means that compensation will be payable under the LHWCA even if a claimant would be entitled to apply for benefits under state law. Parenthetically, it should be noted that there is no danger of a double recovery for a claimant. Section 14(k) provides an employer may receive credit for advance payments of compensation. 33 U.S.C. 914(k). The Benefits Review Board has found credit can be given an employer for payments made under a state compensation act. *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975); *Ferch v. Todd Shipyards Corp.*, 8 BRBS 316 (1978).

In order to understand fully the significance of the original language of the clause under discussion, and the lack of significance in its omission, a short historical review is required. The origin of the language finds its roots in the case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which involved a longshoreman who was injured while working over navigable waters. There was no federal act at the time and as a result the longshoreman applied for compensation under the New York State Act. This Court held that Article III, Section 2 of the U.S. Constitution granted the Federal Government exclusive jurisdiction over admiralty matters and therefore prohibited the state from legislating on any matter which could be covered by federal law. Congress made several ineffectual efforts to permit the states to have jurisdiction over employees on navigable waters, but this Court aborted all such legislative efforts. *See, e.g., Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. Dawson & Co.*, 264 U.S. 219 (1924). In 1927 Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act), 33 U.S.C. §901 *et seq.* When it enacted that law, Congress limited recovery to injuries which occurred "upon the navigable waters of the United States" and further limited recovery to situations only "if recovery for the disability or death" could not validly be provided by state law.

This Court, in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962), completely eliminated the requirement that in order for there to be recovery under the Federal Act, there had to be a situation not "provided by State law." In *Calbeck*, there were two welders who were injured while working on the construction of new vessels that were floating on navigable waters. The claimants were engaged in "maritime-but-local" types of oc-

cupation and entitled to State Workmen's Compensation. Theoretically, with a strict reading of the specific language of the Longshoremen's Act, they would not be entitled to compensation under the Federal law. However, they did apply for Federal compensation, it was granted, and such awards were affirmed by this Court.

Justices Stewart and Harlan in their dissent make it quite clear what the majority rule accomplished:

> I think the statute means what it says, and what it has always been thought to mean — namely, that there can be no recovery under the [Longshoremen's] Act in cases where the State may constitutionally confer a workmen's compensation remedy. While the result reached today may be a desirable one, it is simply not what the law provides, 370 U.S. at 132.

There is an excellent statement of the Court's holding in *Calbeck* in Larson, *Law of Workmen's Compensation*, (1978) §89.25:

> To put the matter in blunt terms, the Supreme Court by judicial construction, deleted from the Longshoremen's Act the second condition of coverage "and if recovery . . . through workmen's compensation proceedings may not validly be provided by State law," . . .

Thus, based upon the well-known principle of statutory construction that a legislature knows the law, it is obvious that the elimination of that clause by Congress in its 1972 amendments was simply a recognition of the law. Congress simply phrased the law in the language which had become the law, was clear law, and had been such for the past ten years.

The effort by the Appellant to read a new Congressional intent into the elimination of certain language was clearly an endeavor to read a meaning into a law

that is contrary to every principle of statutory construction. Congress knew what the law was when it enacted the 1972 amendments and Congress omitted the language which it did because the language had been rendered superfluous by the decision of this Court.

VI. The Legislative History of the 1972 Amendments to the Longshoremen's Act Shows No Evidence of Congressional Intent to Preempt the Field of Maritime Employees' Injuries.

The appellant cites and quotes certain reports which it feels "evidences" the Congressional intent to preempt state law. Brief for Appellant at 39. This material contains no persuasive evidence of such congressional intent. For example, appellant emphasizes with italics that the major purpose of §2318 (the 1972 amendments to the Longshoremen's Act) was to "extend coverage to protect additional workers." Senate Report No. 1125, 92nd Cong. 2d sess. (1972) p.1. Appellees do not deny that a principal purpose of the amendments of 1972 was to "extend coverage" to protect additional workers. But it is a *non sequitur* to state that from this extended coverage the Senate meant to preempt concurrent jurisdiction.

There is also a section in that Senate Report, which points to the need for the Federal Act to be extended to cover workers who "might be uncovered", because the State law did not cover them. Thus, we certainly agree that one of the purposes of the amendments of 1972 was to extend coverage to all maritime workers, especially those who had no remedy under State law. Again this is of no help in considering the issue of the instant case.

Appellant also makes much of the language of the Senate Report which indicates an intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. . . ." *Id.* at 12-13. This statement does not

rule out the continuation of concurrent jurisdiction. It was a purpose of Congress to extend the Federal Act to cover maritime workers whether they were injured while actually afloat on navigable waters or whether they were injured while standing on "any adjoining pier, wharf, dry dock . . ." 33 U.S.C. §903(a). However, the intention of Congress to extend and broaden the Longshoremen's Act does not mean that there was intention to deprive a worker of his right to go into a state forum if the benefits provided by the state exceeded the benefits of the Federal Act. There is absolutely no purpose in such limiting legislation. Again, Congressional intent to preempt state jurisdiction in this area of social-welfare legislation must be clear, definite and unequivocal.

VII. There Is No Valid Federal Interest in Depriving a Maritime Worker of His Right to Compensation Under State Law Where the Benefits Thereof Exceed the Benefits of the LWHCA.

Point VI of Appellant's brief indicates that there is some form of "dominant Federal interest" in providing maritime workers with a sole remedy under LHWCA. It is practically impossible to eliminate the problems of overlapping jurisdiction. Judge Wilkinson in the opinion of the Court below, made an important point on this subject. Discussing Appellant's point that "exclusive federal jurisdiction is necessary to achieve national uniformity in compensating maritime workers," the opinion goes on to say with considerable cogency:

> However, it is clear that the extension of coverage of the Longshoremen's Act limited to land-based activities will not comprehensively cover all maritime activities covered on land; rather, courts must still determine the demarcation line of those areas "customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. §903(a).

> Thus, the federal scheme is not so pervasive as to cover the entire field of the maritime worker's activity. *Sun Shipbuilding and Dry Dock Co. v. Workmen's Compensation Appeal Board,* 398 A.2d 1111, 1114 (1979).

Exclusion of state coverage is virtually impossible. The present coverage by the LHWCA provides:

> Compensation should be payable under this chapter . . . if the disability or death results from an injury occurring upon the navigable waters of the United States, (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area, customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. §903(a).

This definition still leaves the "twilight zone." What is an "adjoining terminal?" The ships unload on a pier and the terminal is 100 feet off the pier inland — is that an "adjoining . . . terminal?" Suppose the terminal is not inland but the employer owns all the land in-between? These questions are only set forth to buttress the point made by Judge Wilkinson that "courts must still determine" when an employee is a maritime worker and when he is not.

The remedial purposes of the Act enable any workman to make his own decision as to the coverage which is best for him. It makes no sense to create a new mass of litigation and precedents as employers try to keep workmen out of the state courts. A decision removing concurrent jurisdiction will only protract the litigation of workers who seek state remedies and are cast out on the ground that the state courts have no jurisdiction. They must then seek a federal remedy and may find that the statute of limitations bars their claim. All of these and many more problems would be multiplied if the present system of concurrent jurisdiction is reversed. On this

point again, Judge Wilkinson makes an excellent observation. After concluding that the federal system has not been written in such fashion to cover "the entire field of the maritime worker's activity" the Judge concluded:

> Similarly, the nature of the subject matter (compensation of injured workers arguably covered within the area of federal jurisdiction) does not demand national uniformity so as to require exclusive federal jurisdiction. Rather because state and federal jurisdiction must meet at some line near the water's edge, the federal interest in providing some compensation to injured workmen would be more nearly served by continuing the concept of concurrent jurisdiction. 398 A.2d at 1114.

The policy considerations for concurrent jurisdiction are supported by the authorities in the field.[10]

In further support of Appellant's contention that there is some form of "dominant Federal interest" in making the Federal remedy for maritime workers' injuries exclusive and depriving the states of jurisdiction, Appellant argues for several pages that the Federal Employer's Liability Act (FELA) 45 U.S.C. §§51-60 is relevant. First and foremost, in order to demonstrate the absurdity of citing the FELA as an example of an exclusive Federal remedy, it should be noted that this Act specifically states:

> The jurisdiction of the courts of the United States under this Chapter shall be concurrent with that of the courts of the federal states. Act of April 5, 1910 36 Stat. 291, 45 U.S.C. §56.

The extent of the concurrency of jurisdiction in FELA cases is demonstrated not only by the specific

10. *Accord*, G. Gilmore & C. Black, *The Law of Admiralty*, 475-26 (2d ed. 1975); 4 A. Larson, *Workmen's Compensation Law*, §89.70 (1978).

Congressional mandate granting state courts jurisdiction but by the fact that even if there is diversity of citizenship and otherwise all the requisites for removal to the federal courts exist, a state action under the FELA *cannot* be removed. See 28 U.S.C. §1445:

> A civil action in any State court against a railroad or its receivers or trustees, arising under Sections 51-60 of Title 45 [the FELA Act], may not be removed to any district court of the United States.

Thus, although Appellant argues that the FELA is a "pertinent example of an exercise of Congressional power to create an exclusive Federal remedy," it is rather obvious that study of the act itself shows it is an excellent example of Congressional power to create concurrent jurisdiction in both the state and federal courts. This is but another example of the beneficient nature of the system designed to compensate employees for injuries wherein Congress desired to give employees the benefit of either state or federal courts depending on the convenience of the employee. Contrariwise, the Appellant in the instant case would deprive injured maritime workers of their rights in appropriate cases to seek the remedy of a state tribunal.

We recognize that when there is a conflict between the FELA and a state law, the federal law governs. However, the issue in the instant case is not a problem of the choice of law but rather concurrency of jurisdiction. On the latter subject, the FELA is a good example of Congressional intent to maintain concurrency of jurisdiction for the benefit of injured employees. This Court originally interpreted the Congressional intent as desiring concurrency of jurisdiction in borderline cases involving maritime workers and that intent still exists.

VIII. THE GRANT OF CONCURRENT JURISDICTION IN BORDERLINE CASES CREATES NO CONFLICT WITH THE LWHCA

In Point VII, Appellant takes the position that the language of the LWHCA is crystal clear, free from doubt, and any employer knows instantly whether the injury is covered by the Longshoremen's Act. Actually, as has already been discussed in some detail, this is not true. The reality of the situation is that a worker who is engaged in activity in, near or related to a maritime environment may at any given moment, when injured, be covered by the LHWCA, may be limited solely to the state workmen's compensation remedy, or may be within coverage of both the LHWCA and the State Workers' Compensation Act. Of course, the amendments of 1972 to the LHWCA have increased the coverage of that act considerably and therefore have eliminated *some* of the doubtful cases. But the elimination of some doubtful cases will, as is always the case in our law, create other doubtful cases. Any imaginative lawyer can by reading the new law immediately perceive questionable cases. What is an "adjoining . . . marine railway. . . ." If an employee is on a railroad car or locomotive which picks up goods discharged by a ship on the pier, then carries it inland, at what point does the employee cease to be a maritime employee covered by the Longshoremen's Act and become an employee covered by either the State Workmen's Compensation Act or the Federal Employers Liability Act? How long does it take for an area to be used by an employer in loading or unloading a vessel to become an area "customarily used" by the employer for that purpose? Suppose an area is designated by the employer for the loading, unloading or repairing of a vessel and an injury occurs on the first day it is used for that purpose? If an employee is injured in an area before a vessel has arrived or before the building of the vessel begins, which Act is applicable?

As stated in *Davis v. Department of Labor, supra*:

> The very closeness of the cases cited above and others raising related points of interpretation has caused much serious confusion. It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the state law "interfere with the proper harmony and uniformity of " maritime law? Yet employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere. See e.g., Ayres v. Parker, D.C., 15 F.Supp. 447. Such a result defeats the purpose of the federal act, which seeks to give "to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation", and the state acts such as the one before us which aims at "sure and certain relief for workmen." 317 U.S. at 254.

CONCLUSION

For the reasons set forth above, Appellees respectfully submit that the decision of the Commonwealth Court of Pennsylvania should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-343.

SUN SHIP, INC.,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH C. KIMMEL and WILLIE MOORE,

Appellees.

On Appeal From the Commonwealth Court of Pennsylvania.

REPLY BRIEF FOR THE APPELLANT.

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REPLY BRIEF FOR THE APPELLANT

Appellant Sun Ship, Inc. ("Sun Ship") files this reply brief to respond to the argument of Appellees ("claimants") that Congress, without any indication of such an intention, adopted a system of concurrent jurisdiction to apply generally to land-based injuries to maritime workers when it enacted the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. ("Longshoremen's Act") Pub. L. No. 92-576, 86 Stat. 1251.[1] In addition, the brief discusses the untoward consequences which would flow from a holding that such a system is what Congress intended.

I. Congress Exercises Its Paramount Power to Define the Maritime Law in a Setting Where Uniformity Is the Rule

The briefs filed by claimants and the United States in this Court appear to urge that the principle of uniformity in the maritime law is a dead letter in the context of the Longshoremen's Act. (Brief for the Appellees at 13; Brief for the United States at 8-13). Whether viewed as a constitutional principle or simply a desirable one, it cannot be seriously questioned that maritime matters are imbued with a dominant federal interest and that the substantive federal maritime law should operate uniformly

1. In addition to the brief filed by claimants, two *amicus curiae* briefs supporting claimants' position have been submitted to the Court. The first is attached to a Motion of Amicus Curiae for Leave to File Brief filed by Local No. 6, Industrial Union of Maritime and Shipbuilding Workers of America, AFL-CIO ("Local No. 6") on March 21, 1980. No disposition was made of Local No. 6's motion at the time this brief was prepared. The second has been filed by the United States over Sun Ship's objections set forth in a letter to the Clerk of this Court, dated April 5, 1980. This reply will address the arguments raised in both *amicus* briefs only to the extent that they supplement arguments presented by claimants or to the extent they raise new issues.

throughout the country. *E.g., Moragne v. States Marine Lines,* 398 U. S. 375 (1970); *Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917); *The Roanoke,* 189 U. S. 185 (1903). In *Nacirema Operating Co. v. Johnson,* 396 U. S. 212, 223 (1969), this Court specifically noted, "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship."

The United States also claims that the decision in *Askew v. American Waterways Operators, Inc.,* 411 U. S. 325 (1973) would somehow limit the operation of the uniformity principle in this case because *Jensen* was there confined to its facts. (Brief for the United States at 11-13). This case, like *Jensen,* involves the availability of a compensation remedy for workers injured in maritime employment, and it is difficult to understand why the *Jensen* principle loses its force when carried landward by Congress if the injuries are sustained during the course of traditional maritime activities such as ship repair, shipbuilding or the loading and unloading of vessels. More importantly, Sun Ship's argument is not that the constitutional principle of *Jensen* requires a finding of preemption here, but rather that when Congress exercises its paramount power to define the substantive maritime law in either in tort, contract or both, the desirability of uniformity in the maritime law should be observed.

That Congress was acting against this background is demonstrated by the language added to the Act in 1972 which is wholly ignored in the briefs supporting claimants' position. As discussed at pages 19 through 22 of Sun Ship's opening brief, Congress defined the term "employee" in section 2(3) of the Act, 33 U. S. C. § 902(3), affirmatively to include any longshoreman and any harborworker, thereby exercising its power in maritime contract law. Simultaneously, Congress redefined "navigable waters of the United States," which is the term traditionally defining maritime tort jurisdiction, to include areas landward of the water's edge. Longshoremen's Act §§ 2(4), 3(a), 33 U. S. C. §§ 902(4), 903(a). Thus, in contrast to the expressly limited exercise of legislative power found in *Askew,* Congress affirmatively exercised its full admiralty powers in 1972, choosing language which not only expanded coverage, but which also evidenced an intent to vindicate the principles of uniformity and federal supremacy in maritime matters.

II. There Is Nothing in the Longshoremen's Act to Suggest That Congress Intended to Establish a System of Concurrent Remedies for Land-Based Injuries Occurring to Maritime Workers

There is no question that prior to 1972 the Longshoremen's Act did not provide a remedy for maritime workers injured upon land. *Nacirema Operating Co. v. Johnson,* 396 U. S. 212 (1969). Notwithstanding this fact, claimants and those supporting their position would have this Court hold that Congress in 1972 intended to create a compensation system under which both federal law and state law are competent to provide a remedy for such land-based injuries. They advance this argument without citing any provision in the amended Longshoremen's Act or any statement from the legislative history to support such a result. Rather, the argument is premised upon this Court's decisions construing the Act prior to its amendment in 1972. Contrary to their contention, those decisions did not announce a general doctrine of concurrent jurisdiction nor are they support for such a doctrine today.

Claimants and both *amici* suggest that *Davis v. Washington Department of Labor and Industries,* 317

U. S. 249 (1942), in which the "twilight zone" doctrine was announced, created a system of concurrent jurisdiction prior to 1972. No such conclusion is possible. *Davis* represented a practical solution in cases where it was difficult to determine in the first instance whether a state or federal remedy applied. *Hahn v. Ross Island Sand & Gravel Co.*, 358 U. S. 273, 274 (1959) (Stewart, J., dissenting). However, as to injuries falling on the federal side of the line, the language quoted from *Davis* by claimants at pages 15 and 16 of their brief makes plain that Section 5 of the Act, 33 U. S. C. § 905, renders the federal remedy exclusive. Accordingly, where a claim falls under the Longshoremen's Act, as do the cases at bar, no concurrent state remedy is available under *Davis*. Claimants apparently urge that the "twilight zone" doctrine be extended to all land-based injuries (Brief for the Appellees at 24-25), but such an extension is not warranted given the limited purpose for which the doctrine was created and wholly inapplicable to cases such as these at bar which cannot properly be characterized as "borderline" or "doubtful."

Claimants' reliance upon *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114 (1972) is also misplaced for the simple reason that the Act today does not contain that language which formed the basis for that decision. *See Nations v. Morris*, 483 F. 2d 577, 583 n. 19 (5th Cir.), *cert. denied*, 414 U. S. 1071 (1973). As is fully discussed at pages 33 through 39 of Sun Ship's opening brief, *Calbeck* represented a departure from earlier decisions which had concluded that the proviso in Section 3(a) of the original Longshoremen's Act limiting coverage to those cases where "recovery . . . may not validly be provided by State law" incorporated the "maritime but local" doctrine. In *Calbeck*, this Court stated:

> We conclude that Congress used the phrase "if recovery . . . may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters.

370 U. S. at 126. Far from judicially deleting this language from the Act, the holding in *Calbeck* relies upon the quoted statutory language.[2]

Moreover, claimants argument that *Calbeck* established a general system of "concurrent not exclusive jurisdiction" (Brief for the Appellees at 13), proves too much. First, *Calbeck* itself did not have occasion to consider the circumstances under which a state remedy might have been available. Second, to the extent *Calbeck* can be read as creating an area of concurrent jurisdiction, that narrow area was only seaward of the water's edge and was necessarily limited to those cases in which this Court had previously recognized the states' competence to provide a remedy under the "maritime but local" exception. Finally, neither *Calbeck* itself nor any subsequent decision of this Court has disturbed the cases which have construed Section 5 of the Act, U. S. C. § 905, to mean that when a claim falls within the coverage of the Longshoremen's Act, the compensation remedy provided there-

2. The United States contends with the deletion of the proviso in Section 3(a) somewhat differently from claimants, arguing that the deletion supports a finding of concurrent jurisdiction. (Brief for the United States at 16-19). The linchpin of that argument is that the proviso was the only language in the unamended Act which supported a mutually exclusive relationship between state and federal coverage. Of course, the very cases upon which the United States relies in making the rest of its argument did not impart such a meaning to the proviso. More fundamentally, the proviso was also the only language which recognized the power of the states to provide a compensation remedy for maritime workers. Therefore, the deletion of the proviso is fully consistent with Congress' intent to replace the two compensation systems—one state, one federal—adjoining at the water's edge with a single, uniform and exclusive federal remedy.

under is exclusive. *Davis v. Washington Department of Labor and Industries,* 317 U. S. at 256; *Nogueira v. New York, New Haven & Hartford R. R. Co.,* 281 U. S. 128 (1930).[3] There is, therefore, no reason to assume that even the *Calbeck* claimants could have pursued a state remedy once it was determined that the Longshoremen's Act applied to their claims. *See Atlas Iron & Metal Co. v. Hesser,* 177 So. 2d 199, 201-02 (Fla. 1965).

The United States argues that this Court's decision in *Industrial Commission of Wisconsin v. McCartin,* 330 U. S. 622 (1947), supports a finding of concurrent jurisdiction under the amended Longshoremen's Act. Neither *McCartin* nor the earlier decision of *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430 (1943), upon which *McCartin* was based, bear upon the question of whether Congress preempted the states' competence to provide a compensation remedy for maritime workers. Both of those cases involved situations where there was no question that two states were equally competent to provide a compensation remedy to a particular worker for a single injury; the issue resolved was the effect of the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, once one state had exercised jurisdiction and awarded compensation on the claim.

3. The United States, although conceding that an employer's obligation to secure payment under the Act is mandatory, questions whether Section 5(a) can really be read to make the Act's remedy exclusive. (Brief for the United States at 19-20). The short-answer to this query is that Section 5 plainly and unequivocally says it is exclusive. *See Crowell v. Benson,* 285 U. S. 22, 38 (1932) ("The liability [under the Act] is exclusive unless the employer fails to secure payment of the compensation. § 5.") The United States further argues, citing statutes which create compensation remedies against the United States, that Congress knew how to oust state compensation remedies for maritime workers in 1972 if it wanted to do so. Given the decisions which had already construed Section 5(a) to provide a remedy exclusive of state compensation statutes, *e.g. Davis v. Washington Department of Labor and Industries,* 317 U. S. 249, 256 (1942), Congress had no reason to alter Section 5(a) in 1972.

Taken together, *McCartin* and *Magnolia* require that a second state hearing a claim for compensation, after another state had awarded compensation for the same injury is required by the Full Faith and Credit Clause to accord the first compensation award the same effect as would be given by the state in which the award was made. As a result, when the first award "was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury," *Industrial Commission of Wisconsin v. McCartin,* 330 U. S. at 626, the second state is precluded from awarding compensation under its statute. Such an intent was found in *Magnolia,* where the Court held Louisiana could not award compensation because a prior award under Texas law was intended to be exclusive of all rights, including rights under the compensation laws of every other state.

Because the principles of full faith and credit are applicable to the federal courts by statute, 28 U. S. C. § 1738, extension of the doctrine announced in *Magnolia* and *McCartin* to a situation involving a state and federal remedy could operate to preclude an award under the Longshoremen's Act for a claimant otherwise entitled to recover thereunder in plain derogation of Congress' intent in 1972. Thus, if a claimant covered by the Longshoremen's Act recovers an award under state law and such award would be held exclusive of all other remedies by the courts of that state, his Longshoremen's Act remedy may be lost. Indeed, this was the result reached in *Landry v. Carlson Mooring Service,* 9 BRBS 518 (1978), *appeal pending,* Nos. 79-1274, 79-1479 (5th Cir.), discussed on pages 56 and 57 of Sun Ship's opening brief. *See Pettus v. American Airlines, Inc.,* 587 F. 2d 627 (4th Cir. 1978) (holding award under District of Columbia Workmen's Compensation Act barred under *Magnolia* doctrine by prior award under Virginia law).

But this result could only obtain if it is determined that states are competent to remedy injuries sustained by workmen otherwise covered by the Longshoremen's Act—that is to say, only if the expansive concurrent jurisdiction for which claimants and the *amici* argue is found to exist. By contrast, the congressional purpose to establish a uniform system is fully vindicated by holding the remedy exclusive under the Longshoremen's Act, which necessarily deprives the states of the opportunity to interfere with a claimant's rights under the Act.

The United States, although recognizing the problem, suggests that the difficulty is solved by holding that the Longshoremen's Act, as supreme federal law, preempts any attempted interference by the states. (Brief for the United States at 26). But this is no solution at all because it ignores the command of 28 U. S. C. § 1738, which requires federal courts to give full faith and credit to a final, exclusive state award. The proposed solution thereby creates a direct conflict between two federal statutes. However, inherent in the proposal is a recognition that the federal interest in providing a remedy under the Longshoremen's Act is so dominant as to preclude any attempted interference by the states. A holding of complete preemption in the first instance would vindicate the dominant federal interest without defeating the important policies of 28 U. S. C. § 1738. *See Landry v. Carlson Mooring Service*, 9 BRBS at 528.5-28.7 (Miller, Boardmember, dissenting).

Claimants' discussion of the provisions of the Federal Employer's Liability Act, 45 U. S. C. § 56, which permit the state courts to exercise jurisdiction concurrent with the federal courts for claims under the FELA is inapposite here. (Brief for Claimants at 22-23). This grant of jurisdiction to hear FELA cases does not allow the states

to decide cases under substantive state law principles. To the contrary, as the court stated in *State ex rel. Burlington Northern, Inc. v. District Court*, 169 Mont. 480, 484-85, 548 P. 2d 1390, 1392-93 (1976):

> While the FELA provides that suits may be filed in either federal or state courts, there can be no question that the rights created by the Act are governed by the decisions of the federal courts. *Bowman v. Illinois Central Railroad Co.*, 11 Ill. 2d 186, 142 N. E. 2d 104, *cert. den.*, 355 U. S. 837, 78 S. Ct. 63, 2 L. Ed. 2d 49. With the enactment of FELA, Congress took over the field of employers' liability to employees in interstate transportation by rail, and all state laws upon the subject were superseded. The rights and obligations of an employee and the employer depend on the FELA as construed by the federal courts.

Accord, Dice v. Akron, Canton & Youngstown R. R. Co., 342 U. S. 359, 361-62 (1952).

For all the reasons set forth in Sun Ship's opening brief, the Longshoremen's Act, like the FELA, provides an exclusive and comprehensive remedy for workers covered thereunder.[4] The fact that Congress established a specialized tribunal, the Benefits Review Board, to hear all ap-

4. Claimants' unsupported suggestion that the remedy provided by the Longshoremen's Act "does not provide anything approaching a comprehensive scheme of rights and liabilities to replace the diverse state laws applicable to injuries covered" is totally wrong. Only a cursory review of the Act's provisions belies appellee's position. For example, the Act and the regulations promulgated thereunder provide a complete procedural system for disposing of both contested and uncontested claims, a complete system for determining the length and amount of compensation due as well as provisions regarding rehabilitation, survivor's benefits, second injury fund, and adjustment of awards. *See Nations v. Morris*, 483 F. 2d 577, 581, *cert. denied* 414 U. S. 1071 (1973); *cf. United States v. Demko*, 385 U. S. 149, 152-53 (1966).

peals of Longshoremen's Act cases in the first instance, thereby fostering uniformity in the Act's construction and application, is yet another indicium of Congress' intent to provide a uniform federal compensation remedy for maritime workers to the exclusion of state law.

III. An Exclusive Federal Remedy for Maritime Workers Covered by the Longshoremen's Act Will Provide a Dependable Compensation System Which Is Fair to Both Employers and Employees

"Any legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement." *Davis v. Washington Department of Labor and Industries,* 317 U. S. at 256 (Frankfurter, J., concurring). In addition, the legitimate interests and rights of an employer under a compensation statute should be considered in determining what compensation remedy is available to injured maritime workers. *See Employers' Liability Assurance Co. v. Cook,* 281 U. S. 233 (1930). Harkening back to the pre-1972 confusion, claimants and the *amici* apparently argue that a system of concurrent jurisdiction will somehow promote a fairer, more certain system by allegedly reducing the number of jurisdictional disputes and by permitting injured maritime workers to pursue either the state or the federal remedy.

The concurrent jurisdiction for which claimants argue will not have the intended effect of eliminating jurisdictional disputes. It must be remembered that on each side of the proposed zone of concurrent jurisdiction there would remain areas of exclusive jurisdiction by virtue of the constitutional infirmity against state compensation remedies for injuries occurring within the area of exclusive federal maritime jurisdiction recognized in *Jensen,* on the one hand, *see, e.g., Wixom v. Travelers*

Insurance Co., 357 So. 2d 1343 (La. Cir. Ct. App. 1978), and the limits of the coverage of the Longshoremen's Act on the other. *See, e.g., Dravo Corp. v. Banks,* 567 F. 2d 593 (3d Cir. 1977). Thus, claimants proposed construction of the Act would result in *two* lines separating exclusive federal and state jurisdiction from the proposed zone of concurrent jurisdiction, one of which would be the very line which caused the jurisdictional confusion prior to 1972. Furthermore, such a construction would create a disuniformity among maritime workers at a single shipyard or port because workers within the area of exclusive federal jurisdiction would not have the election to proceed under state law advocated by claimants for workers injured on land. To allow such disparity "would contribute neither to uniformity nor to fairness. . . . As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." *Johansen v. United States,* 343 U. S. 427, 441 (1952).

On the other hand, an exclusive federal system, given the location of the line drawn by Congress in 1972, will tend to minimize jurisdictional disputes. Because of the nature of maritime employment, wherein workers are often engaged in activities at or near the water's edge, the water's edge is probably the worst possible dividing line between federal and state coverage. Add to this the uncertainty of the "maritime but local" test which determines jurisdiction on the basis of the nature of the work performed at the time of injury, and the situation becomes hopeless, as the pre-1972 experience has shown.

As a result of the 1972 amendments, however, the geographical dividing line has been moved inland from the water's edge, where a significant portion of a maritime

worker's activity takes place and thus where injuries are most likely to occur. The federal remedy now reaches all areas "customarily used by an employee in loading, unloading, repairing or building a vessel." Longshoremen's Act, § 3(a), 33 U. S. C. § 903(a). For an employer such as Sun Ship, this definition would include virtually the entire shipyard, so that from the time an employee reports to work until he departs at the end of the day he will be in a covered situs. *Cf. P. C. Pfeiffer Co. v. Ford,* 100 S. Ct. 328, 334-36 (1979). In addition, as this Court held in *Northeast Marine Terminal Co. v. Caputo,* 432 U. S. 249 (1977), the status test of Section 2(3) of the Act, 33 U. S. C. § 902(3), does not look solely to the nature of the work at the time of the injury but rather covers throughout the working day workers who "spend at least some of their time in indisputably longshoring [ship repair or shipbuilding] operations and who, without the amendments, would be covered for only part of their activity." 432 U. S. at 273. Such a system affirmatively supports Sun Ship's interest as a self-insured employer in administering a single compensation system applicable to all, or virtually all, of its work force which is exposed to the hazards of shipbuilding and ship repair.[5]

While it is undoubtedly the case that jurisdictional questions will arise at the edge of the expanded coverage, it is plainly wrong to suggest that a holding of exclusive federal coverage will recreate the jurisdictional problems of the pre-1972 era. In any event, the possibility that

5. This interest includes the elimination of multiple transaction costs which would necessarily be incurred if claims relating to a single injury were filed under two or more compensation systems and the more certain application of substantive legal principles which will follow from the uniform interpretation of a single statutory scheme by the Benefits Review Board and the federal appellate courts. *See Flowers v. Travelers Insurance Co.,* 258 F. 2d 220, 225 (5th Cir. 1958), *cert. denied,* 359 U. S. 920 (1959).

some questions are left unresolved is not a reason to decline to give full effect to Congress' purpose. Congress has established a system which applies to maritime workers under a comprehensive statute throughout the day in all the areas where their work would normally take them. It would defeat Congress' desire to achieve uniformity to allow some of those maritime workers to recover under state law.

Claimants further argue that a finding of exclusive federal coverage would prejudice workers who mistakenly file claims under state acts which are dismissed for lack of jurisdiction because the federal period of limitations may have expired.[6] Once again, claimants' unsupported argument is wholly unfounded. Both the federal courts and the Benefits Review Board have determined that when a state claim is dismissed for lack of jurisdiction (or when a claimant voluntarily discontinues a mistakenly filed state claim), the period of limitations under the Longshoremen's Act is tolled during the pendency of the state proceedings. *Hollinhead v. Litton Systems, Inc.,* 6 BRBS 84 (1977), *aff'd per curiam,* 571 F. 2d 272 (5th Cir. 1978). *Accord, Wilson v. Donovan,* 218 F. Supp. 944 (E. D. La. 1963), *aff'd per curiam,* 328 F. 2d 313 (5th Cir.), *cert. denied,* 379 U. S. 816 (1964). In short, no claimant will lose benefits under the Act to which he is otherwise entitled if he initially chooses a state forum which has no jurisdiction over the claim.[7]

6. The brief of Local No. 6 discusses at some length the possibility that a worker who brings a federal claim which is subsequently dismissed may be time barred from pursuing state remedies. (Brief for Amicus Curiae at 14-15). Such a claimant would derive no benefit from a finding of concurrent jurisdiction, however, since the conclusion that the claimant is not covered by the Longshoremen's Act would be the same, irrespective of the exclusivity question.

7. In contrast to claimants' speculative fear that, absent concurrent jurisdiction, benefits may be lost to some employees, the presence of concurrent jurisdiction would plainly impose incon-

Finally, both claimants and Local No. 6 attempt to support their positions by suggesting that the Pennsylvania and Maine compensation acts provide advantages to claimants over the Longshoremen's Act. Of course, such advantages, even if they exist, cannot defeat Congress' intent to supersede state law; nor would such claimed advantages be available to maritime workers injured over actual navigable waters because no state has the power to provide its remedy to them. Moreover, this selective review of the provisions of these two statutes is far from conclusive in establishing their superiority and does nothing to establish the superiority of the compensation acts of other maritime states over the Longshoremen's Act. By contrast, in 1972 Congress specifically found compensation levels payable for permanent total disability in some of the maritime states, including Pennsylvania, to be inadequate. S. Rep. No. 1125, 92nd Cong., 2d Sess., 12 (1972); H. R. Rep. No. 1441, 92nd Cong., 2d Sess., 10 (1972).

More fundamentally, the asserted advantages do not withstand scrutiny. Without any support whatsoever, claimants state that the initial hearing of claims is much more prompt under the Pennsylvania Act.[8] Even if this is the case, however, a claimant under the Pennsylvania Act may wait much longer to receive benefits if an appeal is taken. The Longshoremen's Act allows the stay of benefit payments pending appeal only if the employer would be irreparably harmed if required to make payments. Longshoremen's Act § 21(b)(3), (c), 33 U. S. C. § 921(b)(3), (c). By contrast, the Pennsylvania Act allows consideration of any facts deemed relevant by the reviewing body in determining whether a supersedeas should be granted. Pa. Stat. Ann. tit. 77, § 971 (Purdon Supp. 1979-80). Indeed, while the claimants were all adjudged entitled to benefits under the Pennsylvania Act on December 8, 1977 or earlier (J. S. App. pp. A32, A57-A57, A63-A64, A68, A71-A72), none of them has received any amount of those benefits by virtue of the supersedeas entered in each case. Thus, the claimed advantage of an early disposition under the Pennsylvania Act is outweighed by the potential delay in payment of benefits.

Similarly, Local No. 6 contends that the Maine compensation statute favors the claimant by insuring that a hearing is held in which the employer bears the burden of proof before total disability benefits can be terminated for a change in conditions. Local No. 6 is wrong, however, when it states that no similar protection exists under the Longshoremen's Act. Section 22 of the Act, 33 U. S. C. § 922 requires that when an employer seeks for review of a compensation award on the ground of changed conditions the same procedure as for initial claims is followed, including a hearing if a dispute exists. The employer, as the moving party, would bear the burden of proof if a reduction in benefits is sought.

In short, while some advantages may exist under some state compensation statutes, there are also disadvantages which necessarily obtain once the state remedy is chosen, unless claimants are advocating a system whereby the injured worker can pick and choose the best provisions of the applicable state statute and the Longshoremen's Act.

7. (Cont'd.)
sistent obligations on employers, particularly before a claim is filed, as discussed at pages 49 through 56 of Sun Ship's opening brief. If the employer fails to meet these obligations, it may ultimately be penalized. *See Riley v. Eureka Van & Storage Co.*, 1 BRBS 449 (1975) (employer barred from raising statute of limitations defense to claim filed under District of Columbia Workmen's Compensation Act because it failed to file first report of injury with the deputy commissioner, although a similar report had been filed in Virginia).

8. A similar claim is made by Local No. 6 with respect to the Maine statute, again wholly without factual support.

Beyond the manifest lack of fairness to employers and those employees who cannot elect state remedies if such a system were allowed to operate, that is not what Congress intended in 1972 when it balanced the interests of maritime workers and maritime employers to create a comprehensive and exclusive federal compensation remedy.

CONCLUSION

For the reasons set forth above and in Sun Ship's opening brief, the judgment of the Commonwealth Court of Pennsylvania affirming the award of benefits to the five individual appellees should be reversed, and the cause remanded with instructions to dismiss the claims under the Pennsylvania Workmen's Compensation Act for lack of jurisdiction.

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FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-343

In the Supreme Court of the United States

OCTOBER TERM, 1979

SUN SHIP, INC., APPELLANT

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COMMONWEALTH OF PENNSYLVANIA WORKMEN'S COMPENSATION APPEAL BOARD, ET AL.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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COMMONWEALTH OF PENNSYLVANIA WORKMEN'S COMPENSATION APPEAL BOARD, ET AL.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a state may apply its workers' compensation law to land-based injuries that are within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for the general administration of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33

U.S.C. 901-950, and its several statutory extensions.[1] See 33 U.S.C. 939. The Secretary's responsibilities have been delegated to the Director of the Office of Workers' Compensation Programs. See 20 C.F.R. 701.201-701.203. The relationship between state workers' compensation systems and the LHWCA may affect the benefits available under the LHWCA and the proper administration of the Act. Hence, this Court's determination of the nature of that relationship may have a substantial impact on the performance of the Director's official duties.

STATEMENT

Each of the five private appellees was injured in the course of his employment in the shipbuilding or repair operations at appellant's shipyard adjacent to the Delaware River in Chester, Pennsylvania, between May 1973 and June 1975 (J.S. 8; J.S. App. A3, A19, A26, A33-A34, A40-A41, A48). In each case, the injury caused a permanent facial scar.

Appellees filed claims for workers' compensation benefits under the Pennsylvania Workmen's Compensation Act. Appellant contended that the injuries were within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, and that such coverage is exclusive, preempting the otherwise applicable state law.

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[1] See District of Columbia Workmen's Compensation Act, D.C. Code Ann. §§ 36-501 to 36-502 (1973); Defense Base Act, 42 U.S.C. 1651-1654; Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171-8173; Outer Continental Shelf Lands Act, 43 U.S.C. 1333(c).

Appellees did not dispute that the LHWCA applied to their injuries but disagreed that the coverage of the federal statute is exclusive. In four cases, the referee (the state hearing officer) rejected appellant's argument and awarded compensation for a "serious and permanent facial disfigurement" under Section 306(c)(22) of the Pennsylvania law, Pa. Stat. Ann. tit. 77, § 513(22) (Purdon Cum. Supp. 1979) (J.S. App. A54-A57, A61-A64, A65-A68, A69-A72). In appellee Fields' case, the referee also found that a serious and permanent disfigurement had occurred, but he accepted appellant's argument and dismissed the claim (J.S. App. A58-A60).

Appeals were taken in each case to the Pennsylvania Workmen's Compensation Appeal Board, which, in substantially identical opinions, sustained the four awards (J.S. App. A18-A24, A33-A39, A40-A46, A47-A53) and reversed the dismissal of appellee Fields' claim (J.S. App. A25-A32). The Board, adopting the rationale of *Umbehagen* v. *Equitable Equipment Co.*, 329 So.2d 245 (La. Ct. App.), review denied, 333 So.2d 241 (La. 1976), found that it was unlikely that Congress had intended to preempt state compensation laws by passage of the 1972 amendments to the LHWCA, because the history of the relationship between the original LHWCA and state compensation laws had shown that "'concurrent jurisdiction is the only workable policy'" (J.S. App. A21).

The Commonwealth Court consolidated the five cases on appeal and affirmed (J.S. App. A1-A10). It found that nothing in either the language or the legislative history of the 1972 amendments to the LHWCA indicated a clear intention to preempt state laws (*id.* at A6-A7). The court concluded that "the federal interest in providing some compensation to injured workmen would be more nearly served by continuing the concept of concurrent jurisdiction" (*id.* at A7).

The Supreme Court of Pennsylvania denied appellant's petitions for allowance of appeals (J.S. App. A11-A15).

SUMMARY OF ARGUMENT

I.

The constitutional requirement of a uniform maritime law does not bar the application of the state legislation involved here. In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court held that there exists an area of traditional maritime law in which the need for uniformity precludes the application of any state legislation. The so-called *Jensen* line, however, has never been held to extend to land-based injuries such as those involved in this case or even to the limits of the coverage of the pre-1972 LHWCA. In *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court explicitly held that *Jensen* was confined to its facts, relating to vessels on the navigable waters, and that the *Jensen* line does not move in tandem with a congressional extension of federal admiralty jurisdiction. Accordingly, the 1972 extension of LHWCA coverage does not

suggest that *Jensen* should be extended to prohibit the application of the Pennsylvania Workmen's Compensation Act in this case.

II.

If state law is preempted by federal law, an application of the state law violates the Supremacy Clause. In order to support a finding that state jurisdiction has been ousted, however, the intent of federal law to preempt must be clearly manifested or the state law must be inconsistent with the federal law. The 1972 amendments to the LHWCA do not indicate that Congress intended to preempt state law. And under the doctrine of *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), which permits a supplemental award to be made under a compensation statute in one jurisdiction that provides higher benefits as long as credit is given for amounts paid under a prior award in another jurisdiction, the application of state law does not conflict with the purposes of the LHWCA.

In 1972, Congress deleted the provision in Section 3(a) of the Act (33 U.S.C. (1970 ed.) 903(a)) that made LHWCA benefits available only where recovery "may not validly be provided by State law." This section was the only provision of the LHWCA that ever suggested that federal and state law operated in mutually exclusive spheres and that federal law could not intrude where state law was entrenched. Its deletion in 1972 surely does not signify an intent to preempt state law. The deletion simply recognized that jurisdiction was, in fact, concurrent between

federal and state law, and in addition, that the 1972 amendments extended the coverage of the Act to areas in which the validity of state law coverage had never been subject to doubt.

Section 5 of the LHWCA (33 U.S.C. 905) also does not indicate an intent to preempt state law. That section makes the workers' compensation remedy exclusive of other types of remedies (such as those available under tort or admiralty law), but not of other jurisdictions' workers' compensation statutes. Prior to 1972, Section 5 (33 U.S.C. (1970 ed.) 905) was not considered inconsistent with concurrent jurisdiction. Moreover, similar exclusivity provisions in state workers' compensation statutes have not been construed to bar a supplemental award under the statute of a sister state. By contrast to the situation here, when Congress has sought to make a compensation remedy exclusive of state compensation laws, it has done so by specific and unmistakable language. See 42 U.S.C. 1651(c); 5 U.S.C. 8173.

The legislative history of the 1972 amendments does not evidence an intent to preempt state law. The Senate and House Reports clearly indicate that Congress was principally concerned about the inadequacy of state benefits relative to federal benefits. Accordingly, it extended federal jurisdiction to areas that had previously been within exclusive state jurisdiction so as to make federal benefits uniformly available to employees who worked both within those areas and within areas that had been covered under the pre-1972 Act. Congress did not intend to disturb the concurrent operation of state law that did not interfere with this purpose of making the level of federal benefits uniformly available.

The application of state law under the concurrent jurisdiction principles of *Industrial Commission* v. *McCartin, supra,* does not conflict with the LHWCA. If the state award is more favorable than the benefits available under the LHWCA, a claimant's resort to his state remedy would not conflict with the purposes of the LHWCA. If the state award is less favorable, the purposes of the LHWCA may still be realized by a supplemental award under the federal statute. The issue of the continuing validity of *McCartin* is now before the Court in *Thomas* v. *Washington Gas Light Co.*, No. 79-116, argued March 19, 1980. If state law operates to prevent an employee from receiving the amount of benefits to which he is entitled under the LHWCA, it does conflict with the purposes of the Act. Thus, to the extent that the decision in *Thomas* has the effect of barring a supplemental award under the LHWCA, state law would be preempted when coverage overlaps, either completely or at least when the state benefits are less favorable than the federal benefits.

Finally, a finding that federal law preempts state law would resurrect many of the administrative difficulties that prevailed during the 1927-1942 period. Before applying state workers' compensation statutes in cases involving land-based injuries to maritime workers, state courts would be forced to consider difficult questions of the scope of the LHWCA. Claimants would thus run some risk of losing a remedy because

of an inability to determine with assurance at the outset which law applies. Accordingly, the court below, like the majority of courts and commentators that have considered the question, correctly held that the 1972 amendments do not preempt state law but rather permit the same concurrent jurisdiction relationship between state law and the LHWCA as exists under *McCartin* between workers' compensation statutes of sister states.

ARGUMENT

THE APPLICATION OF THE PENNSYLVANIA WORKERS' COMPENSATION STATUTE TO APPELLEES' CLAIMS RESULTING FROM INJURIES ON LAND DOES NOT VIOLATE THE CONSTITUTION

I. THE FEDERAL INTEREST IN COMPENSATING MARITIME WORKERS INJURED ON LAND DOES NOT REQUIRE NATIONAL UNIFORMITY

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act to extend its coverage to certain maritime workers injured on land.[2] Relying on *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), appellant contends (Br. 15-22, 25, 27 n.8) that this extension of coverage ousted the states of the jurisdiction that they had historically exercised over such injuries. *Jensen*, appellant argues, establishes that the federal interest in maritime law is a paramount one that requires uniformity and that the Constitution thus bars any state legislation in this area. According to appellant, when

[2] See 33 U.S.C. 902(3), 903(a). See generally *P. C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979), slip op. 2-4; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 260-265 (1977).

Congress amended the LHWCA in 1972 to extend maritime coverage shoreward, it also extended the *Jensen* uniformity requirement. This argument, however, ignores the limited holding of *Jensen* and is inconsistent with later decisions of this Court.

The injury in *Jensen* was sustained by a longshoreman on a gangway above the water. It thus occurred in an area traditionally thought to be covered by maritime law, to which the federal judicial power extends under the Admiralty Clause (Art. III, Sec. 2) of the Constitution. In deciding whether the New York Workmen's Compensation Act could apply to such an injury, this Court recognized that state legislation may modify or affect the general maritime law unless it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216. The Court viewed New York's attempt to impose its obligations on a foreign ship as just such an interference that would "seriously hamper[] and impede[]" international and interstate navigation. 244 U.S. at 217.[3]

[3] Appellant's assertion (Br. 15 n.4) that *Jensen* held that the Federal Employers' Liability Act (FELA), 45 U.S.C. 51-60, "could not apply" because "the need for uniformity in maritime matters was so great" is incorrect. The Court found that the FELA was not applicable by its terms because the employee was engaged in work unrelated to rail operations, even though the shipowner also happened to be a railway company. 244 U.S. at 212-213.

Injuries to maritime workers that occur on land, such as those in the instant case, have little connection with the principle of uniformity enunciated in *Jensen* and are wholly outside its scope. The general maritime law provided no remedy for such injuries, and thus the application of state law involves no interference with any necessary uniformity of maritime law. Accordingly, only a few years after the *Jensen* decision, this Court specifically held that the *Jensen* rule did not extend to land-based injuries. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). The Court also has long rejected the contention that *Jensen* precludes the application of state law to any injury that is within the federal admiralty jurisdiction and covered by a federal remedy. State law was applicable to such injuries where the employment was "maritime but local" and hence where the application of state rules would not "work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries*, 277 U.S. 135, 137 (1928). See also *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922). Indeed, under the "twilight zone" doctrine, state law could even apply in an area that was only arguably "maritime but local." *Davis* v. *Department of Labor and Industries*, 317 U.S. 249 (1942). In sum, as long as a case involved local aspects, rather than being of such a character that nationally uniform rules were required, application of

state workers' compensation law has always been viewed as permissible.[4]

The Court only recently has rejected the idea that a congressional extension of the admiralty jurisdiction implies a corresponding extension of the *Jensen* line. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), involved a challenge to a Florida statute fixing liability for pollution damage caused by ocean-going vessels. One basis for the challenge was that the statute was unconstitutional under *Jensen*, primarily because it intruded into areas that were covered by the Admiralty Extension Act of 1948, 46 U.S.C. 740, which extended the admiralty jurisdiction of the United States to injuries on land caused by vessels on the navigable waters. See 411 U.S. at 337-341. The Court disagreed, reaffirming the principle that "[e]ven though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." 411 U.S. at 341.

The Court did not reject the principle of *Jensen*. There continue to be certain traditional areas of maritime law in which the need for uniformity precludes the applicability of state law. The Court found, however, that the *Jensen* rule is "confined to * * * suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews." 411 U.S. at 344. Beyond *Jensen*, there is a much

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[4] See also *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854 (1949); *Bethlehem Steel Co.* v. *Moores*, 335 U.S. 847 (1948).

broader area where Congress may constitutionally exercise its admiralty powers, but not necessarily "to the exclusion of powers traditionally within the competence of the States." 411 U.S. at 341.[5] The Court in *Askew* declined to construe the Admiralty Extension Act "to move the *Jensen* line of cases shoreward to oust state law from situations involving shoreside injuries" that were within the coverage of the Act. 411 U.S. at 344. By the same token, there can be no doubt that the 1972 extension of the LHWCA to land-based injuries of maritime workers also falls within this broader area and that the Admiralty Clause does not bar the application of state law to such injuries.[6]

Appellant (Br. 44 n.16) seeks to distinguish *Askew* on the ground that the Federal Water Quality Im-

[5] Cf. *Oil Workers* v. *Mobil Oil Corp.*, 426 U.S. 407, 420 n.12 (1976) (state "right-to-work" laws cannot apply to seamen whose work is performed primarily on high seas even though hired within state, but can apply "to maritime workers, such as longshoremen, whose job situs is within the State").

[6] Indeed, the 1972 extension of the LHWCA was quite limited in comparison to the Admiralty Extension Act considered in *Askew*, because the amendments to the LHWCA did not purport to extend the admiralty jurisdiction of the United States. In suggesting an extension of the LHWCA in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 216 (1971), this Court observed that "extending the constitutional boundaries of the maritime law would not require Congress to make an equivalent extension of the jurisdiction of the federal courts sitting in admiralty." Congress responded to this suggestion by merely extending a maritime-power federal remedy to a subject outside the historic boundaries of maritime law, without bringing the subject within the bounds of the full admiralty jurisdiction.

provement Act expressly allowed state regulation. As the Court recognized in *Askew* (411 U.S. at 344), however, in areas where the *Jensen* uniformity rule applies, Congress does not have the power to permit state regulation. See *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920). *Askew* establishes that *Jensen* is not applicable here. The question then remains whether application of the state law conflicts with the LHWCA and thus violates the Supremacy Clause. It is to this question that we now turn.

II. APPLICATION OF A STATE WORKERS' COMPENSATION STATUTE TO THE LAND-BASED INJURY OF A MARITIME EMPLOYEE DOES NOT VIOLATE THE SUPREMACY CLAUSE

Appellant contends that application of the Pennsylvania Workmen's Compensation Act violates the Supremacy Clause because the LHWCA, as amended in 1972, preempts state law within the scope of its coverage. Although the injuries involved in this case are within the jurisdiction that has been exercised under state workers' compensation statutes for many decades, it is undisputed that Congress could have preempted state coverage that overlapped with the LHWCA had it chosen to do so. The inquiry into whether such preemption has actually occurred begins with the fundamental principle that the powers of the states are "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ray* v. *Atlantic Richfield Co.*, 435 U.S.

151, 157 (1978). See also *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[7] Apart from clear statutory language, such a congressional purpose may be evidenced when the federal scheme is so pervasive as to leave no room for state supplementation, or when the federal interest, such as in the field of foreign affairs, is so dominant that preemption of state law may be assumed, or when enforcement of the state statute is inconsistent with the objective of the federal statute. *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. Under these principles, we submit that, as the Commonwealth Court found, the LHWCA does not preempt state workers' compensation statutes where coverage overlaps, but rather permits concurrent coverage.

Appellant fundamentally misperceives the nature of this concurrent jurisdiction. Appellant apparently assumes (see Br. 23, 56) that concurrent jurisdiction means only that either state or federal law may apply in the first instance, but that once jurisdiction is exercised under one law, the applicability of the other law is precluded. But this Court has made clear that concurrent jurisdiction in the workers' compensation area, at least as between state statutes, is not mutually

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[7] This principle is particularly strong in the workers' compensation field. The Court has stated, in connection with the relationship between two state statutes, that only "unmistakable language" in one state's workers' compensation statute will warrant the conclusion that the statute is intended to "cut off an employee's right to sue under other [workers' compensation] legislation passed for his benefit." *Industrial Commission* v. *McCartin*, 330 U.S. 622, 628 (1947).

exclusive in this manner. In *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), the Court held that where the workers' compensation statutes of two different states are applicable to the same injury, an award under the statute of one state may be supplemented by an award under the statute of the second state, so long as a credit is given for the amounts paid under the first award. The Court stated in *McCartin* that it would be presumed that such a supplemental award could be made unless the first state evidenced by "unmistakable language" its intention that its award act as a bar to any supplemental award.

The strong policy interests supporting supplemental state workers' compensation awards apply with equal force to supplemental LHWCA awards. For this reason, it has generally been understood that, to the extent concurrent jurisdiction exists under the LHWCA, the *McCartin* rule permitting supplemental awards governs. See G. Gilmore & C. Black, *The Law of Admiralty* 431-432 (2d ed. 1975); 4 A. Larson, *The Law of Workmen's Compensation* § 89.53 (1978). Hence, a determination of liability under a state statute has been held not to bar a subsequent LHWCA award. See *Newport News Shipbuilding and Dry Dock Co.* v. *Director, OWCP*, 583 F.2d 1273 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F.2d 409 (9th Cir. 1952); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F.2d 968 (4th Cir. 1951); but cf. *Shea* v. *Texas Employers' Insurance Ass'n*, 383 F.2d 16 (5th Cir. 1967) (state award held to bar LHWCA claim because state act and LHWCA held mutually exclusive).

A. The 1972 Amendments to the LHWCA Did Not Purport To Oust The States Of Concurrent Jurisdiction

1. *The Amendment of Section 3(a) of the LHWCA Was Not Intended to Preempt State Coverage*

Prior to 1972, Section 3(a) of the LHWCA provided that compensation was available under the Act where the injury "occur[s] upon the navigable waters * * * and if recovery for the disability or death through workmen's compensation proceedings *may not validly be provided by State law.*" 33 U.S.C. (1970 ed.) 903(a) (emphasis added). Appellant argues (Br. 25-39) that the deletion of the "may not validly be provided by State law" clause in 1972 manifests Congress' intent to preempt state law. On its face, of course, it is the deleted phrase itself that seems to suggest an exclusivity between state and federal law, and the deletion would appear to be strong evidence of an intent to reject such an exclusive relationship. Moreover, the history of the interpretation of the LHWCA confirms that the deletion was not intended to effect a preemption of concurrent state coverage.

The state law limitation in Section 3(a) originally was thought to draw a line, albeit an extremely murky one, between injuries that were covered exclusively by the LHWCA and injuries that were covered exclusively by state statutes. See, *e.g.*, *Alaska Packers Ass'n* v. *Marshall*, 95 F.2d 279 (9th Cir. 1938). See generally G. Gilmore & C. Black, *The Law of Admiralty* 418-420 (2d ed. 1975). If state law applied, federal law did not. In 1942, however, the Court acknowledged that no sharp line could be drawn between federal and state jurisdiction prior to litigation. In *Davis* v. *Department*

of Labor and Industries, 317 U.S. 249 (1942), the Court held that an award could validly be provided under either state law or the LHWCA for an injury that fell within the "twilight zone" of uncertainty as to whether state law could apply. Thereafter, in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), the Court held that the LHWCA extended to any injury on the "navigable waters" of the United States, whether or not the injury could be covered by state law. The Court, however, did not disturb the long line of cases dating from *Davis* that recognized a sphere of concurrent state and federal jurisdiction. Indeed, *Calbeck* underlined the principle that state and federal jurisdiction were concurrent, not mutually exclusive, in permitting a claimant who had already received payments under a state statute to receive an award under the LHWCA subject to credit for those payments. 370 U.S. at 131-132.[8]

Appellant recognizes that *Calbeck* delineated an area of concurrent jurisdiction (see Br. 34, 39) but mistakenly asserts (Br. 37) that it was the "may not validly be provided" language of Section 3(a) that led to that result. In fact, it was despite the strong implications of that language that the Court recognized concurrent jurisdiction. See *Calbeck* v.

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[8] This ruling did not conclusively establish that the *McCartin* rule permitting supplemental awards applied to the LHWCA, because the claimant had received voluntary payments rather than payments pursuant to an award. However, in citing authority in support of the supplemental LHWCA award, the Court did not draw a distinction between cases involving voluntary payments and cases involving final state awards.

Travelers Insurance Co., supra, 370 U.S. at 132 (Stewart, J., dissenting). Indeed, some commentators suggested that the state law limitation of Section 3(a) was no longer of any continuing significance in light of *Calbeck.* See 4 A. Larson, *The Law of Workmen's Compensation* § 89.25 (1978).[9] In any event, the limitation was clearly inconsistent with the intention of the 1972 amendments to extend the LHWCA to cover certain injuries on land, which were not even within the area where state law coverage was deemed questionable under *Jensen.* Consequently, the limitation was deleted.

It is undisputed that the 1972 amendments extended federal coverage to injuries within state jurisdiction; the question is whether those changes displaced state coverage or established concurrent coverage. The deletion of the state law limitation is relevant to the first point, because it indicates that coverage under state law cannot preclude LHWCA coverage, but the deletion does not in any way suggest an intent to go further and to preempt state coverage. To the contrary, as noted above, the deletion eliminated the only language in the LHWCA that could be read as supporting a mutually exclusive relationship

[9] But see *Shea* v. *Texas Employers' Insurance Ass'n, supra,* where the court held, after *Calbeck,* that the state law and the LHWCA were mutually exclusive; hence, an LHWCA award could not supplement a state award. *Shea* was roundly criticized as being inconsistent with *Calbeck.* See, *e.g.,* 4 A. Larson, *The Law of Workmen's Compensation* § 89.53(b) (1978). The decision has no validity today because, in finding state and federal coverage to be exclusive, it relied solely on the state law limitation that was deleted in 1972. See 383 F.2d at 18-19.

between state and federal coverage. In the absence of such an express statement of purpose to make the federal Act exclusive where it applies, it would appear that Congress intended to preserve the concurrent jurisdiction that had existed prior to 1972 and that is common in the workers' compensation field between state statutes under the principles of *McCartin.*

2. *The Exclusive Remedy Provision of the LHWCA Does Not Preclude Relief Under State Workers' Compensation Laws*

Appellant also contends (Br. 22-25) that provisions of the LHWCA in existence prior to 1972 make the benefits under the Act mandatory and exclusive. We do not dispute that the LHWCA is "mandatory" in the sense that it requires that the benefits it provides be available as compensation for injuries within the coverage of the Act.[10] Thus, any state proceedings that purport to displace the right to benefits under the LHWCA would violate the basic scheme of the Act. But no such interference with federal rights is comprehended by the decision of the Commonwealth Court. Federal rights are preserved under the *McCartin* principle either because a state award provides the level of benefits available under the LHWCA or, if it does not, because an award may be made under the LHWCA to supplement the state award.

Appellant erroneously asserts that Section 5(a) of the Act, 33 U.S.C. 905(a), makes the benefits under the LHWCA exclusive of any state benefits. But

[10] This feature of the Act is particularly evident in the anti-waiver provisions. 33 U.S.C. 915(b), 916.

that section is simply a general exclusivity provision that is patterned after and virtually indistinguishable from similar provisions in every state workers' compensation statute. The purpose of the provision is to substitute the workers' compensation remedy for tort and other remedies, not to affect the workers' compensation remedies of other jurisdictions.[11] Similar provisions in state statutes have been held not to bar remedies under the workers' compensation statutes of other states. *Industrial Commission* v. *McCartin, supra.* See generally 4 A. Larson, *The Law of Workmen's Compensation* § 85.40 (1978). And Section 5(a) of the LHWCA itself has never been held to preempt state coverage, else the concurrent jurisdiction recognized prior to 1972 could never have been established.

If Congress had desired to alter the pre-1972 concurrent jurisdiction system to preempt state law, it could easily have done so by express language referring to state statutes. In fact, Congress has used such express language in other compensation statutes, particularly statutes that incorporate the LHWCA by reference, when it has intended to preempt state law. See 42 U.S.C. 1651(c); 5 U.S.C. 8173; see also 5 U.S.C. 8116(c).[12] It is thus apparent

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[11] Indeed, this is somewhat clearer in the LHWCA than in many state provisions, because Section 5 refers to other remedies "at law or in admiralty for damages," a formulation that does not appear to cover state workers' compensation statutes.

[12] 42 U.S.C. 1651(c) provides:

> The liability * * * under this chapter shall be exclusive and in place of all other liability * * * under the workmen's compensation law of any State, Territory, or other jurisdiction * * *.

5 U.S.C. 8173 provides:

> This liability is exclusive and instead of all other liability of the United States or the instrumentality to the employee * * * and any other person otherwise entitled to recover * * * by an administrative or judicial proceeding under a workmen's compensation statute * * *.

that Section 5(a) of the LHWCA cannot be read to preclude state workers' compensation coverage.

3. *The Legislative History of the 1972 Amendments Does Not Indicate an Intention to Preempt State Law*

In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), this Court described three principal concerns addressed in the 1972 amendments to the LHWCA. The one that is relevant here is the workers' desire "to improve the benefit schedule deemed inadequate by all parties." 432 U.S. at 261 (footnote omitted). In increasing these benefits, however, Congress recognized that it would be creating a great disparity between the level of federal compensation and the "significantly lower state rates." 432 U.S. at 262. Because under the then-existing law the amount of benefits received depended upon whether the injury occurred over water, Congress chose to extend federal coverage to certain land-based injuries so that maritime workers would not "be relegated to what Congress deemed clearly inadequate state compensation systems" depending upon where the workers happened to be injured. *Ibid.*

The discussion in the Senate and House Reports regarding the extension of the scope of the coverage confirms that Congress was principally concerned that adequate benefits be paid. The reports note that most states provided inadequate benefits and that "even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10 (1972). To correct this disparity, Congress determined "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. No. 92-1125, *supra*, at 13; H.R. Rep. No. 92-1441, *supra*, at 10-11. That is, Congress determined that benefits under the LHWCA should be uniformly available to maritime workers who in the course of their employment walk in and out of the coverage of the pre-1972 Act. There is no suggestion anywhere in the statute or the legislative history that Congress was concerned about, much less sought to eliminate, a recovery under state statutes that provided benefits more favorable than the LHWCA.[13]

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[13] Congress also sought to protect shipowners and employers from no-fault remedies (other than workers' compensation) available under the pre-1972 Act that were denying them the benefits of the exclusivity of workers' compensation. In return, the benefits within the workers' compensation scheme were to be increased. See *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 261-262. There was no intent to shield employers from generous workers' compensation benefits; that would have been contrary to this trade-off that was at the heart of the 1972 legislation.

Appellant relies in its preemption argument (Br. 42) upon a statement in the congressional reports that a disparity of benefits would result "if State laws are permitted to continue to apply to injuries occurring on land." But it is clear from the context of this statement, which follows an itemization of the inadequacies of state benefits as compared to the new LHWCA benefits, that the Senate and House Committees were concerned about the continuation of *exclusive* state coverage of injuries occurring on land. This exclusive state coverage was removed by the 1972 amendments. Permitting state laws to continue to operate *concurrently* with the new federal jurisdiction, however, does not present the problem of restricting workers to inadequate state benefits, because they can forgo state proceedings altogether or supplement any state award with an LHWCA award under the principles of *McCartin*. Accordingly, con-

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Moreover, the Senate Report notes that the amendments were "fully consistent with" the recommendations of the National Commission on State Workmen's Compensation Laws. S. Rep. No. 92-1125, *supra*, at 2. The Commission recommended that state benefits be based upon a "statewide average weekly wage." See Report of the National Commission on State Workmen's Compensation Laws 64, 71 (1972). LHWCA benefits are now based on a "national average weekly wage." 33 U.S.C. 906(b). In a state whose statute followed the Commission's recommendations and had a higher average wage than the national, it would not be consistent with the Commission's recommendations to preempt that state's workers' compensation law.

current jurisdiction is consistent with the concern expressed in the committee reports.[14]

The legislative history of the statute thus lends no support to the contention that the 1972 amendments sought to preempt state law. Certainly no such intention is "clear and manifest." *Rice* v. *Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

B. Concurrent State Coverage, So Long As Supplemental Awards Are Permitted, Does Not Conflict With The Proper Operation Of The LHWCA

The fundamental purpose of the 1972 expansion of LHWCA coverage was to make the benefits provided under the Act available, as a minimum, to those employees who were brought within its coverage. Any state statute that serves to prevent a covered employee from receiving these benefits conflicts with this purpose and is unenforceable. However, a state law that operates concurrently with the LHWCA, along the lines of the relationship between state statutes set out in *McCartin,* complements, rather than conflicts with, the LHWCA. A state statute, such as the one involved in this case, that provides for a greater benefit than the LHWCA does not frustrate the purpose of the federal statute to provide a minimum level of benefits to injured workers. And a state statute that provides smaller benefits also does

[14] It is also worth noting that the statement relied on by appellant cannot be taken to represent a congressional decision to preempt state coverage, because it is unlikely that such a decision would have been advanced without extended discussion of *Davis* and *Calbeck.* Those cases are not even mentioned in this section of the House and Senate Reports. See G. Gilmore & C. Black, *The Law of Admiralty* 425 (2d ed. 1975).

not conflict with this purpose of the LHWCA so long as the employee is not barred by receipt of a state award from recovering a supplemental award under the LHWCA.

The *McCartin* framework has worked well in the area of state workers' compensation statutes. It permits the vindication of each jurisdiction's strong interest in providing the benefits available under its own compensation law. It also permits the injured employee to receive the full benefits to which he is entitled—benefits that the employee would have received without the need for a supplemental award if he had initially chosen the most favorable forum in which to seek an award. Yet these advantages are obtained at little cost to the employer, because double recovery is prevented by crediting the amounts paid under the first award against the second award. These principles are equally applicable in the state-federal context. It has therefore generally been recognized that the concurrent jurisdiction between state law and the LHWCA should operate under the principles of *McCartin.* See G. Gilmore & C. Black, *The Law of Admiralty* 431-433 (2d ed. 1975); 4 A. Larson, *The Law of Workmen's Compensation* § 89.53 (1978); Watson, *Broadened Coverage Under The LHWCA,* 33 La. L. Rev. 683, 694-695 (1973).

In *Thomas* v. *Washington Gas Light Co.,* No. 79-116, argued March 19, 1980, this Court is presented with the question of the continuing validity of the existing system of concurrent jurisdiction between state workers' compensation statutes. If the Court cuts back on the principle of supplemental awards

recognized by *McCartin*, that decision could affect the relationship between state law and the LHWCA. If a modification of *McCartin* in *Thomas* has the effect of barring a supplemental award under the LHWCA,[15] a state award that provides less favorable benefits than those provided under the LHWCA would conflict with the LHWCA because it would prevent the employee from receiving the level of benefits guaranteed to him by the federal statute. In such circumstances, the prior state proceeding would frustrate the intent of Congress in passing the 1972 amendments.[16] Thus, concurrent jurisdiction between state law and the LHWCA depends upon the continuing validity of the

[15] It does not necessarily follow that supplemental awards under the LHWCA should be barred simply because supplemental *state* awards are barred. Under *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), a state may render an award under its workers' compensation statute exclusive of an award under the statute of another state, if it clearly expresses its intent to do so. Because of the supremacy of federal law, however, Congress may override a state's attempt to preclude the issuance of a federal award. Thus, when the application of a state statute purports to exclude a remedy under the LHWCA, the LHWCA should perhaps be read to preempt the exclusivity provision of the state law. Cf. 33 U.S.C. 915(b) and 916.

[16] This problem is illustrated by *Landry* v. *Carlson Mooring Service*, 9 B.R.B.S. 518 (1978), appeal pending, Nos. 79-1274 and 79-1479 (5th Cir.). In *Landry*, an employee received a $20,000 award under the Texas workers' compensation statute. This award was then held to bar a claim under the LHWCA, under which the employee would have been entitled to significantly higher benefits. We agree with appellant (Br. 56) that the decision in *Landry* frustrates the purposes of the LHWCA. However, we do not agree that the solution to the *Landry* problem is to preempt state coverage; rather, we submit that *Landry* is wrongly decided. First, it misinterprets this Court's decision in *McCartin* with respect to the preclusive effect to be given to the Texas award. Second, it fails to consider the supremacy of the LHWCA to state law, which enables the LHWCA to override any alleged intent of Texas to preclude a federal award.

principle of supplemental awards under the LHWCA. If supplemental awards under the LHWCA were to be barred, state coverage must be held to be preempted when it overlaps with the LHWCA, either completely or at least to the extent that the state benefits are less favorable than the federal.

Assuming that supplemental awards under the LHWCA continue to be permitted, we submit that a system of concurrent jurisdiction contributes to the smooth administration of the LHWCA. If federal jurisdiction is held to preempt state coverage, employers would be able to assert the threshold defense that an injury is covered by the LHWCA, and thus not by state law, in proceedings under state compensation acts. As appellant notes (Br. 46), the line of federal coverage drawn by the 1972 Amendments is by no means a clear one. See, *e.g.*, *P. C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979); *Northeast Marine Terminal Co.* v. *Caputo*, *supra*. Hence, under a system of exclusive jurisdiction, state courts would be forced to wrestle with difficult questions of coverage under the LHWCA, which can only result in greater delay in ultimately awarding deserving claimants workers' compensation benefits. Moreover, the policy of promoting uniformity of interpretation of the LHWCA by restricting review under the Act to a single administrative tribunal and the federal courts of appeals would be substantially undermined.

If the 1972 amendments are held to preempt state law, the courts would be faced with a situation similar to the one that prevailed between 1927 and 1942 under the "maritime but local" test—two spheres of mutually exclusive jurisdiction divided by a blurry line. That situation has been described as "undesirable in the highest degree" for the administration of the Act. G. Gilmore & C. Black, *The Law of Admiralty* 425 (2d ed. 1975). See also *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 259. Moreover, it would place a severe burden on the claimant, who will often be unable to tell whether state or federal law applies; he might choose to pursue what turns out to be the wrong remedy while losing the opportunity to pursue the correct one. See *Davis* v. *Department of Labor and Industries*, *supra*, 317 U.S. at 254.[17] The appropriate solution is for state and federal law to apply concurrently, with supplemental awards permitted if a credit is given for the amounts paid under the first award.[18] Accordingly, the court below correctly concluded that the 1972 amendments to the LHWCA do not preempt state law. See *Poche* v. *Avondale Shipyards, Inc.*, 339 So.2d 1212, 1220 (La.

[17] Indeed, such a situation recently occurred. A Florida court held that it could not apply its otherwise applicable statute because the LHWCA covered the injury. However, the Benefits Review Board held that the LHWCA was not applicable. *Holcomb* v. *Robert W. Kirk and Associates, Inc.*, No. 78-566 (B.R.B. Feb. 28, 1980). This Court alone could resolve such a conflict.

[18] If Congress determines that the concurrent operation of state law is interfering with the administration of the LHWCA, it would be a simple matter for it to make the federal coverage preemptive by express statutory language.

1976), appeal dismissed, 434 U.S. 803 (1977); *Umbehagen* v. *Equitable Equipment Co.*, *supra*; *Johnson* v. *Texas Employers Insurance Ass'n*, 558 S.W.2d 47 (Tex. Civ. App. 1977). See 4 A. Larson, *The Law of Workmen's Compensation* §§ 89.53, 89.70 (1978); G. Gilmore & C. Black, *The Law of Admiralty* 424-426, 431-434 (2d ed. 1975); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 694-695 (1973).

CONCLUSION

The judgment of the Commonwealth Court should be affirmed.

Respectfully submitted.

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APRIL 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317156 277

Supreme Court, U. S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-343

SUN SHIP, INC.,
Appellant

V.

COMMONWEALTH OF PENNSYLVANIA WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ JOSEPH C. KIMMEL and WILLIE MOORE,
Appellees

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF

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This Motion for Leave to file an amicus curiae brief is brought on behalf of Local No. 6, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO. Located in Bath, Maine, Local No. 6 represents approximately 4,000 maritime employees working at the Bath Iron Works shipyard, located on the Kennebec River, navigable waters of the United States.

The work performed at Bath Iron Works by Local No. 6 members is both new ship construction and repair and conversion of older vessels. This work is performed in various locations: aboard vessels lying in the navigable waters, aboard vessels under construction resting on marine railways, aboard vessels at drydock, and in a variety of shops located on land at distances from two hundred to five hundred feet from the water's edge. Many members of Local No. 6 spend a portion of their working day

aboard the vessels lying in navigable waters and another portion of their working day in the land-based shops where prefabrication and assembly of vessels is performed.

It is from this perspective of the reality of the maritime workplace that the accompanying brief is respectfully submitted. Because shipbuilding and repair are hazardous occupations, many members of Local No. 6 have sustained work-related injuries. Thus the union has a particular and unique interest in providing this Court with its anaylsis of the issues presented by this appeal.

Because of the particular characteristics of the workplace noted above, Local No. 6 respectfully suggests that this Honorable Court should hear from the collective bargaining representative of the more than 4,000 employees whose lives will be most directly affected by the Court's decision by permitting leave to file the accompanying brief.

Further, Local No. 6 has a paramount interest in establishing the right of its members to pursue the most favorable worker's compensation remedy available. As described more fully in the accompanying brief, the provisions of the Maine Workers' Compensation Act are in many cases more advantageous to claimants than the parallel provisions of the Longshoremen's Act. Local No. 6 has a unique interest in vindicating the rights of Maine citizens who live and work in Maine to pursue their remedies under Maine law. To that end, Local No. 6 respectfully requests this Court to grant this Motion.

Dated: March 21, 1980

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and thirty-nine copies of the within Motion of Amicus Curiae for Leave to File Brief have been served in hand this date to the United States Supreme Court. In addition, copies of said Motion have been served this date by Special Delivery, United States mail, to Jeffery C. Hayes, Esq., Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, PA 19109, Counsel for the Appellant; Joseph Lurie, Esq., Galfand, Berger, Senesky, Lurie & March, 1737 Chestnut Street, Suite 1200, Philadelphia, PA 19103, Counsel for the Appellees; Joshua Gillelan, Esq., Office of the Solicitor, Department of Labor, Suite N-2716, NDOL, Washington, D.C., 20210; and Allan Horowitz, Esq., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530.

Dated: March 21, 1980

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Supreme Court, U.S.
FILED
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I. THE LONGSHOREMEN'S ACT CONTAINS NO "CLEAR AND MANIFEST" INTENT TO DISPLACE THE POLICE POWERS OF THE STATE

The case law dealing with federal preemption of states' rights has been exhaustively analyzed in the briefs submitted by the private parties in this matter, as well as the amicus briefs submitted by the Solicitor of Labor and the United States Solicitor General. The Appellant is alone in its belief that the Longshoremen's Act, 33 U.S.C. §901 et seq., requires such preemption.

In this Court's prior decisions analyzing preemption issues, the Court begins "with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). It is respectfully submitted that the Appellant has failed to demonstrate

conclusively any such "clear and manifest" purpose so as to defeat the application of state law.

It cannot be seriously contested that at least since this Court's 1942 decision in Davis v. Department of Labor and Industry, 317 U.S. 249 (1942), there has been concurrent state and federal jurisdiction over injuries sustained by land-based maritime workers occurring in the "twilight zone".

The Davis Court faced the jurisdictional issues in the context of fifteen years of experience under the Longshoremen's Act. During those years there was a seemingly endless stream of litigation in which courts struggled mightily to define the precise contours of the "maritime but local" doctrine in which this Court had ruled state workmen's compensation statutes could validly be applied. Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922).

Leading commentators have characterized that period as one full of "horrors"

in which "workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located." Gilmore and Black, Law of Admiralty, (2d Ed. 1975) at 425. Others have written that courts during this early period were faced with the "tedious task of sorting out endless cases as falling on one side or another of the federal jurisdictional boundary." A. Larson, Workmen's Compensation Law, Vol. 4, §89.70 at 16-284.

This Court used the Davis case as a means "to call a halt to the time-consuming and expensive process of fighting each close case through the appellate hierarchy." Larson, supra, at §89.25. The Davis Court officially recognized that there was a "shadowy area [twilight zone] within which at some undefined and undefineable point, state laws can validly provide compensation." 317 U.S. at 253 (1942).

For the 30 years following Davis this Court consistently upheld the application of the "twilight zone". In fact, the doctrine of concurrent state

and federal jurisdiction was extended to uphold state remedies for injuries in areas which had previously been considered within exclusive federal jurisdiction. See Bethlehem Steel v. Moores, 335 U.S. 874 (1948); Baskin v. Industrial Accident Commission, 338 U.S. 854 (1949), and Hahn v. Ross Island Sand and Gravel Co., 358 U.S. 272 (1959).

In this Court's landmark decision in Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), the assertion of concurrent jurisdiction was clear and unequivocal:

> "Congress brought under the coverage of the Longshoremen's Act all [such injuries] whether or not a particular injury might also have been within the constitutional reach of a state's workmen's compensation law." 370 U.S. at 117. (emphasis added)

The Appellant in the instant case candidly acknowledges that Calbeck "was read as creating an area of concurrent jurisdiction where both state and federal law may operate," but questions whether

this result is compelled. Appellant's Brief, p. 34. Courts of Appeals and commentators, both before and after the 1972 Amendments, have had no such questions. In Nations v. Morris, 483 F.2d 577 (CA 5 1973), the Court reviewed this Court's jurisdictional decisions and commented that in Calbeck "the Supreme Court made it clear that there existed an area in which both state and federal compensation systems were competent to provide a remedy."

Thus, for 30 years, from 1942 to 1972, this Court upheld the "twilight zone" doctrine of concurrent jurisdiction which, according to Professors Gilmore and Black:

> "Seems to have worked reasonably well. Indeed a theory of concurrent jurisdiction seems to be the only sensible way of dealing with state and federal statutes which meet at some vaguely defined line." Gilmore and Black, Law of Admiralty, (2d Ed. 1975) at 425.

II. THE 1972 AMENDMENTS DID NOTHING TO ALTER THE "TWILIGHT ZONE" AND CONCURRENT JURISDICTION DOCTRINES

The Appellant contends the 1972 Amendments "wiped the slate clean" by eliminating the need for concurrent jurisdiction. Appellant's Brief at p. 38. It is respectfully submitted that a careful review of those amendments reveals no such intention or effect.

The Appellant relies heavily on the exclusive remedy provision of the Act, 33 U.S.C. §905(a) and concludes "Congress' intent to preempt state law can hardly be more clearly expressed." Appellant's Brief, pg. 24. However, as the Appellees correctly note in their Motion to Dismiss, this language was part of the Act prior to the 1972 Amendments at a time when concurrent jurisdiction was consistently being upheld. (Motion of Appellees to Dismiss Appeal at 3-4.) Thus, this provision can provide no basis to conclude the 1972 Amendments "wiped the slate clean".

The legislative history of the 1972 Amendments demonstrates that considerable attention was focused during committee deliberation on recent decisions of this Court which permitted "circuitous" actions by injured employees against their stevedoring employers. See Ryan Stevedoring v. Pan-Atlantic, 350 U.S. 124. The comments made to the committee by Ralph Hartman (now Director of the Office of Workers' Compensation Programs, which administers the Longshoremen's Act) are illustrative:

> "Thus, despite the express provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act that the Act is the exclusive remedy of an employee against his employer, stevedores and ship repair yard contractors are required to pay damages to their employees, over and above compensation payments, with the shipowner acting as a legally constituted conduit.
>
> There is a logical basis for the granting of immunity to a shipowner subjected to a liability due to an unseaworthy condition solely created by a stevedore or ship repair yard

> contractor. In these cases the circuity of action arises with the result that the stevedore and ship repair yard contractor have a dual liability. Clearly this is a situation that is contrary to the original intent of the exclusive remedy provisions of the Longshoremen's Act and, because of the greatly added burden it places upon stevedores and ship repair yard contractors, should be corrected....
>
> The re-establishment of the exclusive remedy provision of the Act can, with due regard for our employees, be accomplished by removing the warranty of seaworthiness as a basis for determining the liability of ships and shipowners..." Hearings before Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, p. 190-191.

It is only in this context -- Congressional concern over circuity of actions -- that any changes in the effects of Section 905 must be evaluated. Nowhere in the legislative history is there any suggestion that Section 905 after 1972 required preemption of state laws when it had not done so before.

Appellant discusses in some detail the alleged import of Congress' 1972 deletion of the phrase in Section 903(a) conditioning Longshoremen's Act coverage "if recovery...may not validly be provided by State law." To the Appellant:

> "Congress could only be certain of the amended Act's exclusive application to land-based injuries...if it elimated the language suggesting the possibility that state law could provide a remedy to injured maritime workers as well". Appellant's Brief, p. 37.

It is noteworthy that the Appellant provides no reference to the legislative history in support of its interpretation of Congressional intent on this point.

There is an equally plausible and logical explanation for Congress' deletion of the former proviso to Section 903(a). As leading commentators have noted, this Court's decision in Calbeck had already deleted this phrase by judicial construction. See Larson, supra, at §89.25. In the absence of any "clear and manifest" explanation of Congress' action

in this regard, it is equally valid to presume that Congress was simply bringing the statutory language into conformity with previous judicial construction.

Finally, the Appellant supports its preemption theory by reference to the following statement in the Senate report:

> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land." 3 U.S.C.A. Congressional and Administrative News (1972), 4698, 4707, cited in Appellant's Brief at p. 41.

The importance of that isolated remark in the committee reports has been seriously questioned by Professors Gilmore and Black:

> "It may not be entirely clear that the offhand reference to state laws in the passage

quoted was meant to mean that LHCA was to displace state compensation acts with respect to the land injuries to be brought within the LHCA coverage. However, even if that was the intended meaning, the statement does not appear to be entitled to much weight. The part of the Committee Report which is devoted to the shoreward extension of LHCA coverage does not so much as mention the pre-1972 case case law on 'maritime but local' and the 'twilight zone' which we have discussed in the preceding section. (By way of contrast the part of the Report which is devoded to the abolition of the recovery for unseaworthiness by LHCA workers goes into detail about the Supreme Court cases which are to be struck down.) It may be that the writer of the Report mistakenly assumed that the LHCA had always provided the exclusive compensation remedy for injuries which occurred on navigable waters and consequently assumed that it would also be exclusive with respect to the land injuries newly covered by the amendments." Gilmore and Black, supra, at 425.

It strains credulity to believe that Congress could have intended the sweeping

changes suggested by the Appellant without so much as a single reference to the Calbeck decision.

III. A FINDING OF FEDERAL PREEMPTION WILL PRODUCE UNNECESSARY DELAY IN WORKMAN'S COMPENSATION PROCEEDINGS AND DENY MARITIME EMPLOYEES A POTENTIALLY MORE FAVORABLE STATE REMEDY

If this Court finds the Longshoremen's Act to be a maritime employee's exclusive remedy, there is a real danger that the Courts will find themselves once again faced with the "tedious" task of deciding jurisdictional issues on a case-by-case basis. From the standpoint of judicial economy, such a prospect is frightening. As Professors Gilmore and Black note:

> "If the LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation

> intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law. Gilmore and Black, supra, at 425.

If this Court reverses its prior findings of concurrent jurisdiction the injured maritime employee may well find himself with no remedy at all, simply because he has unknowingly chosen the wrong forum in which to pursue his claim. If the employee files his claim under the Longshoremen's Act, he may successfully persuade an Administrative Law Judge that he falls within the Longshoremen's Act's coverage. The Employer may then appeal that decision to the Benefits Review Board. 33 U.S.C. §921. The Benefits Review Board may uphold the finding of coverage. The employer may then file yet a further appeal to the United States Court of Appeals. That court may reverse the Benefits Review Board and find no coverage. By that time, the statute of limitations under the applicable state

law will almost certainly have expired, leaving the employee with no remedy. This scenario would be unacceptable and would violate the basic underpinnings of workmen's compensation law -- to provide a speedy and equitable remedy for all work-related injuries. Obviously, the opposite but parallel prospect -- innumerable appeals through state courts followed by the expiration of the federal statute of limitations -- is equally unacceptable.

The only way in which an injured employee will be able to protect his rights if this Court finds preemption will be to file and process claims under both acts simultaneously. This too will place injured employees in an intolerable position.

The Appellees in the instant case have asked this Court to allow them to pursue the more favorable state remedy available to them. Shipyard workers in Maine find themselves in much the same position as these Appellees. Even a cursory review of the Maine Workers'

Compensation Act, Title 39 M.R.S.A. §1 et seq., demonstrates there are several situations in which it provides a more favorable remedy than its federal counterpart.

First, in many areas the benefit levels are superior under Maine law. For instance, the Longshoremen's Act contains no provision for payment of scheduled loss for permanent impairment to a claimant's back, whereas under Maine law he may receive up to 200 weeks compensation. 39 M.R.S.A. §56-A.

Second, the Benefits Review Board has ruled that any payments a claimant receives for a scheduled loss are to be credited against any continuing partial compensation to which he may be entitled. See Tibbetts v. Bath Iron Works Corp., 10 BRBS 245. Under Maine law there is no such setoff and a claimant may receive both forms of compensation without reduction.

Third, the procedural safeguards for claimants is superior under Maine law.

Once an employee is receiving total disability benefits under Maine law, the burden of proof is shifted to the Employer to demonstrate a change in condition. An employee's benefits may not be summarily terminated until he is afforded a hearing before the Workers' Compensation Commission. 39 M.R.S.A. §100. There is no such protection under the Longshoremen's Act.

Fourth, and perhaps most important, the Maine Act can be much more easily and effectively administered than the Longshoremen's Act. Partially because there is no branch of the Office of Workers' Compensation Programs in Maine, partially because of the massive Office of Workers' Compensation Programs workload, claimants under the Longshoremen's Act must wait many months before they are even able to obtain a hearing under the Longshoremen's Act. This rarely occurs under the Maine Act, where hearings are scheduled easily, promptly and on a regular basis.

CONCLUSION

Under pre-1972 law there was clearly concurrent jurisdiction over land-based maritime employees. Had it chosen to do so, Congress could have altered this doctrine by express statutory amendment backed by substantive legislative history. Neither express language nor legislative history supports any alteration. It is respectfully submitted that any judicial construction finding federal preemption is unsupported by either statute, case law, or sound public policy. Indeed, a finding of preemption would plunge this court back to the pre-twilight zone era of endless litigation. In a time when the Court is gravely and properly concerned with its caseload, such a spectre is ominous.

As stated in the Motion for Leave to File this Amicus Curiae Brief, Local No. 6 of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, has many members whose working day requires them to cross the line of jurisdiction which the Appellant proposes

several times each day. Those employees should not be forced to guess at each moment which side of the line they work on. To guarantee those employees a certain, expeditious and equitable remedy, it is respectfully requested that the Decision of the Supreme Court of the Commonwealth of Pennsylvania be affirmed in full.

Dated: March 21, 1980

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and thirty-nine copies of the within Amicus Curiae Brief have been served in hand this date to the United States Supreme Court. In addition, copies of said Amicus Curiae Brief have been served this date by Special Delivery, United States mail, to Jeffery C. Hayes, Esq., Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, PA 19109, Counsel for the Appellant; Joseph Lurie, Esq., Galfand, Berger, Senesky, Lurie & March, 1737 Chestnut Street, Suite 1200, Philadelphia, PA 19103, Counsel for the Appellees; Joshua Gillelan, Esq., Office of the Solicitor, Department of Labor, Suite N-2716, NDOL, Washington, D.C., 20210; and Allan Horowitz, Esq., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530.

Dated: March 21, 1980

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